TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 205.

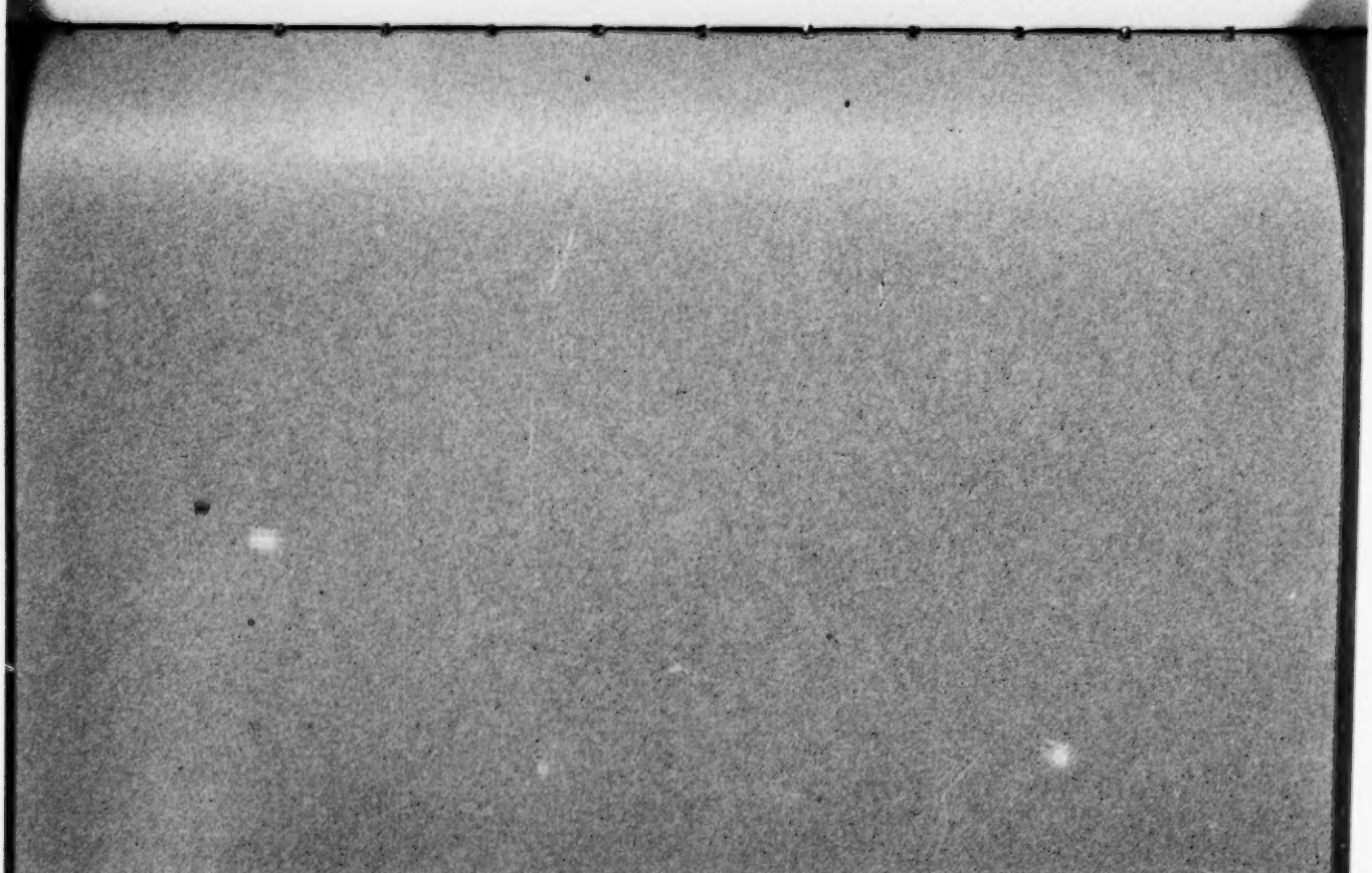
THE UNITED STATES, APPELLANT,

vs.

ALPHONSE GAY.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 27, 1923.



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1 Court of Claims.

ALPHONSE GAY,
vs.
THE UNITED STATES. } No. 33756.

I. *History of proceedings.*

On May 24, 1917, the plaintiff filed his original petition.

On October 26, 1918, by leave of court, the plaintiff filed his amended petition.

On November 18, 1921, by leave of court, the plaintiff filed his second amended petition which is as follows:

2 II. *Second amended petition.*

Filed Nov. 18, 1921.

To the Honorable the Court of Claims:

The claimant, Alphonse Gay, respectfully represents:

I. The claimant after 13 years 6 months and 10 days of service as an enlisted man in the Navy, was, on the 6th day of July, in the year 1899, appointed by warrant of the President of the United States a warrant machinist in the Navy, the title of which office has been changed by subsequent legislation to machinist, and remained on the active list in the performance of duty as such until the 23d day of November, 1908, when he was retired from active service on account of an incapacity resulting from an incident of the service, and was thereafter paid at the rate of $1,687.50 a year, as provided by law.

II. He continued to be so paid until the 30th day of April in the year 1916. From and after the first of May, 1916, he has received no pay whatever, and upon inquiry was informed by the paymaster that his pay was stopped by orders from the Navy Depart-

3 ment. He promptly protested in writing to the Chief of the Bureau of Navigation of the Navy Department against the stoppage of his pay and requested that it be resumed. He received no response whatever to his communication. Thereafter his name appeared in the officially published Register of the Navy of officers in the service January 1, 1917, but without his receiving any pay. After the outbreak of war he notified the Navy Department that he was ready for any duty on sea or shore but without receiving any response to his said notices. He has never been notified of any charge against him or that he has been dismissed or dropped from the rolls of the Navy.

III. He therefore claims pay as a retired machinist of the Navy from May 1, 1916, to September 30, 1921.

IV. This claim is made under the following provisions of statute: Revised Statutes, secs. 1405, 1406, providing for the appointment of warrant officers.

Sec. 1453, providing for retirement for incapacity resulting from an incident of the service.

Sec. 1556, fixing the pay of warrant officers.

Sec. 1558, allowing to officers retired 75% of the sea pay of their grade.

Act of March 3, 1899, Navy personnel act, secs. 14 and 15 (30 Stat. 1007, 1008) creating the office of warrant machinist with the same pay and right of retirement as other warrant officers.

Act of May 13, 1908 (35 Stat. 128) increasing the pay of all warrant officers 25%.

4 Act of March 3, 1909 (35 Stat. 771) changing the title of warrant machinist to machinist.

Revised Statutes, sec. 1229, providing that no officer of the military or naval service shall in time of peace be dismissed from the military or naval service except in pursuance of a sentence of court-martial to that effect.

Revised Statutes, sec. 1624, being the Articles for the Government of the Navy, Article 36 of which provides: "No officer shall be dismissed from the naval service except by the order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof."

Article 64 of said Articles for the Government of the Navy provides that "officers shall mean commissioned and warrant officers," etc.

V. No other action has been had on said claim in Congress or by any of the departments; no person other than the claimant is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The claimant is a citizen of the United States. And the claimant claims nine thousand one hundred twenty-seven dollars and sixty-two cents ($9,127.62.)

KING & KING,
Attorneys for Claimant.

5 DISTRICT OF COLUMBIA, *ss:*

George A. King, being duly sworn, deposes and says: I am one of the attorneys for the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge, information and belief.

GEORGE A. KING.

Subscribed and sworn to before me this 17th day of November, 1921.

MAY LOU H. BYINGTON,
[SEAL.] *Notary Public, D. C.*

III. *General traverse.*

No demurrer, plea, answer, counter-claim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

IV. *Argument and submission of case.*

On May 29, 1922, this case was argued and submitted by Mr. George A. King, for the plaintiff, and by Mr. John G. Ewing, for the defendant.

V. *Order allowing filing of supplemental petition.*

Entered June 12, 1922.

It appearing that the judgment this day entered in this case is in excess of the amount claimed in the petition, it is ordered by the court that the plaintiff have leave to file a supplemental petition bringing the amount down to date.

VII. *Supplemental petition.*

(Filed by leave of court, June 12, 1922.)

To the Honorable the Court of Claims.

The claimant, Alphonse Gay, respectfully represents:

I. The claimant after 13 years 6 months and 10 days of service as an enlisted man in the Navy was, on the 6th day of July in the year 1899, appointed by warrant of the President of the United States a warrant machinist in the Navy, the title of which office has been changed by subsequent legislation to machinist, and remained on the active list in the performance of duty as such until the 23d day of November, 1908, when he was retired from active service on account of an incapacity resulting from an incident of the service, and was thereafter paid at the rate of $1,687.50 a year, as provided by law.

II. He continued to be so paid until the 30th day of April in the year 1916. From and after the first of May, 1916, he has received no pay whatever, and upon inquiry was informed by the paymaster that his pay was stopped by orders from the Navy Department. He promptly protested in writing to the Chief of the Bureau of Navigation of the Navy Department against the stoppage of his pay and requested that it be resumed. He received no response whatever to his communication. Thereafter his name appeared in the officially published register of the Navy of officers in the service January 1, 1917, but without his receiving pay. After the outbreak of war he notified the Navy Department that he was ready for any duty on sea or shore but without receiving any response to his said notices. He

has never been informed of any charge against him or that he has been dismissed or dropped from the rolls of the Navy.

III. He therefore claims pay as a retired machinist of the Navy from May 1, 1916, to June 12, 1922.

8 IV. This claim is made under the following provisions of statute:

Revised Statutes, secs. 1405, 1406, providing for the appointment of warrant officers.

Sec. 1453, providing for retirement for incapacity resulting from an incident of the service.

Sec. 1556, fixing the pay of warrant officers.

Sec. 1558, allowing to officers retired 75% of the sea pay of their grade.

Act of March 3, 1899, Navy personnel act, secs. 14 and 15 (30 Stat. 1007, 1008), creating the office of warrant machinist with the same pay and right of retirement as other warrant officers.

Act of May 13, 1908 (35 Stat. 128), increasing the pay of all warrant officers 25%.

Act of March 3, 1909 (35 Stat. 771), changing the title of warrant machinist to machinist.

Revised Statutes, sec. 1229, providing that no officer of the military or naval service shall in time of peace be dismissed from the military or naval service except in pursuance of a sentence of court-martial to that effect.

Revised Statutes, sec. 1624, being the Articles for the Government of the Navy, Article 36 of which provides: "No officer shall be dismissed from the naval service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof."

Article 64 of said Articles for the Government of the Navy provides that "officers shall mean commissioned and warrant officers," etc.

9 V. No other action has been had on said claim in Congress or by any of the departments; no person other than the claimant is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the claimant has at all time borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The claimant is a citizen of the United States. And the claimant claim ten thousand three hundred and two dollars and fifty-two cents ($10,302.52).

KING & KING,
Attorney for Claimant.

DISTRICT OF COLUMBIA, *ss:*

George A. King, being duly sworn, depos[illegible] and says: I am one of the attorney for the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge, information, and belief.

GEORGE A. KING.

Subscribed and sworn to before me this 12th day of June, 1922.

[SEAL.] MARIE A. SEARLES,
Notary Public, D. C.

10 VIII. *Findings of fact, conclusion of law, and opinion of the Court.*

Entered June 12, 1922.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

The plaintiff, Alphonse Gay, after serving 13 years 6 months and 10 days as an enlisted man in the Navy, was, on the 6th day of July, 1899, appointed by warrant of the President of the United States a warrant machinist in the Navy, the title of which office has been changed by subsequent legislation to machinist, and remained on the active list in the performance of duty as such until November 23, 1908, when he was retired from active service on account of an incapacity, to wit, deafness, resulting from an incident of the service. In 1907 he received a medal granted under the act of March 3, 1901, in recognition of his service on board the U. S. S. Cincinnati at the Battle of Matanzas, Cuba, April 27, 1898.

II.

The plaintiff was born in Switzerland on May 19, 1856. He was admitted to citizenship of the United States by the United States District Court for the Eastern District of New York August 4, 1897. He has always borne true faith and allegiance to the United States and has done no act inconsistent with his allegiance nor with his status as an officer of the United States Navy.

III.

After his retirement from active service in the United States Navy he was, on August 9, 1909, granted permission to leave the limits of the United States for a period of one year from September 16, 1909. August 17, 1910, he was authorized to remain abroad for one year from September 16, 1910. September 12, 1911, he was authorized to remain abroad for a period of one year from September 17,
11 1911. August 30, 1912, he was authorized to remain abroad beyond the limits of the United States indefinitely.

In accordance with the permission so given him he has been residing at several places in Switzerland, and has kept the Bureau of Navigation informed of his address by letters written annually or oftener, as required by Articles 704, 705, 706, Naval Instructions, 1913. He made one or more affidavits of continued American citizenship before the American consul at Geneva.

He was registered as an American citizen at the American consulate at Geneva. A registration certificate was furnished to the plaintiff and showed that he was at that time living at Clos des Cretes, Clarens, Switzerland. On November 25, 1912, the plaintiff called at the U. S. consulate at Geneva and requested a renewal of his registration certificate. The vice consul informed him that since he had lived over two years in Switzerland, the country of his birth, he would have to sign an affidavit to overcome the presumption of expatriation. The plaintiff duly signed such affidavit and on November 26, 1912, he called again at the consulate and asked that the affidavit be not sent to the Department of State.

January 11, 1916, he was officially notified by the Director of Naval Intelligence, Navy Department, by a letter addressed to him in Switzerland, that he had been slated for duty in connection with that office in time of war and was requested in case of return to the United States and to Washington to call at the Office of Naval Intelligence, but "should you remain abroad indefinitely, and opportunity offer, it is requested that you confer with the naval attaché at Paris."

He received this letter though the naval attaché at Paris, who transmitted the same to him January 25, 1916, with a request to acknowledge receipt.

January 28, 1916, plaintiff acknowledged receipt to said naval attaché.

February 24, 1916, the Chief of the Bureau of Navigation of the Navy Department addressed him a copy of General Instructions issued to naval officers abroad directing them to notify the accredited U. S. naval attaché of their presence, address, and probable length of stay, etc., or if in countries or colonies to which no naval attaché is accredited, to make similar report to the nearest U. S. naval attaché practicable.

March 15, 1916, in accordance with this order, claimant notified the naval attaché at Paris, giving particulars in regard to his residence, and expressing himself as ready and willing to leave Switzerland whenever recalled to the United States by the Navy Department.

March 17, 1916, the naval attaché acknowledged receipt of his letter of March 15, 1916, stating:

"2. In case you are in the vicinity of Paris, I would be greatly obliged if you would call at the embassy in order to receive certain confidential information which I have been directed by the Navy Department to furnish you.

"3. There is no immediate necessity of your coming to Paris at present."

June 19, 1916, and again July 25, 1916, he was notified by the pay officer of the New York Navy Yard, who had been carrying his accounts and paying him his monthly retired pay, that said pay officer had been directed by the Navy Department to make no further payments to him.

September 1, 1916, he wrote the Chief of the Bureau of Navigation, Navy Department, Washington, D. C., reciting this information from the pay officer and respectfully requesting to be informed of the reason for that action, and stating that he was ready to answer at any time for his action. No response seems ever to have been made to this letter.

November 12, 1917, he wrote the Bureau of Navigation stating that he was able to perform sea or shore duty; that his health was in very good condition, and that the deafness for which he was retired was improving; that he could speak French fluently; and that a call to any duty to which the department would see fit to assign him would be gladly received.

It was officially stated by the Director of Naval Intelligence, December 14, 1917, "There is at present no duty in this office to which the above subject might be assigned."

His name appears continuously in the officially published annual "Register of the Commissioned and Warrant Officers of the Navy and Marine Corps" down to and including that of January 1, 1917, where he is carried as a machinist on the retired list of the Navy, and, under the column "Present residence or duty," he is listed, "Abroad."

It does not appear by what authority his name was omitted from the register.

IV.

He has been paid as a machinist on the retired list of the Navy of maximum length of service at the rate of $1,687.50 a year from the time of his retirement to and including April 30, 1916, since which date he has received no pay. If claimant is entitled to pay as a machinist on the retired list from May 1, 1916, to June 12, 1922, there would accrue to him $10,302.52.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides as a conclusion of law that the plantiff is entitled to recover. It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of ten thousand three hundred and two dollars and fifty-two cents ($10,302.52).

OPINION.

HAY, Judge, delivered the opinion of the court:

This is a suit brought by the plaintiff to recover the retired pay of a machinist in the Navy, the plaintiff having been retired as a ma-

chinist on November 23, 1908. He was paid his retired pay from the date of his retirement up to May 1, 1916, but since that date his retired pay has been withheld, and he alleges that there is now due him the sum of $10,078.90. He was notified on June 19 and July 25, 1916, by the pay officer of the New York Navy Yard, that that officer had been directed by the Navy Department to make no further payment to him. On September 1, 1916, he wrote to the Chief of
13 the Bureau of Navigation, Navy Department, Washington, D. C., requesting to be informed why his pay had been stopped. To this letter no response was made, and on May 24, 1917, he brought this suit in this court.

The effect of this action of the Navy Department was to remove the plaintiff from his position as a retired officer of the Navy and to deprive him of his rights as such and of the emoluments guaranteed him as such retired officer without giving him an opportunity to be heard. The reasons given for this action by the Navy Department are that the plaintiff under the act of March 2, 1907, should be officially regarded as having expatriated himself; and that having so expatriated himself the plaintiff had abandoned his office as a machinist in the Navy in view of the requirement of the law and regulations that officers of the Navy must in all cases be citizens of the United States. It will be observed that these reasons and conclusions were never communicated to the plaintiff, and he was given no opportunity to make answer to them.

The provision of the statute under which the Navy Department held that the plaintiff had expatriated himself is as follows (34 Stat. 1228):

"SEC. 2. That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign State in conformity with its laws, or when he had taken an oath of allegiance to any foreign State.

"When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however*, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also*, That no American citizen shall be allowed to expatriate himself when his country is at war."

The act is entitled "An act in reference to the expatriation of citizens and their protection abroad." The purpose of the act is to relieve the Government of the obligation to protect citizens residing abroad after the limit of two or five years, when their residence there is not shown to be of such a character as to warrant the presumption that they intend to return and reside in the United States. After the time limit has expired it is presumed that the citizen does not intend to return, and it is necessary, in order that he may have

the protection of this Government, for him to show affirmatively that it is his bona fide intention to return to the United States to live. The essential thing under the act is the intention to return to and reside in the United States. Op. Atty. Gen. 28, 504, 508, 509. The provisions of the act are penal and are not to be extended to include any person not within its purview.

From the facts proved it appears that the plaintiff does not come within the provisions of the act. He was an officer of the United States Navy who went abroad with the permission of the Navy Department; that permission was repeatedly renewed, and while living in Switzerland under this permission of the department his pay as such officer is taken from him without any reason there-
14 for being given to him. It is true that, acting upon the opinion of a subordinate office of the department that he had expatriated himself, his pay was stopped. But all the facts in the case were apparently not submitted to the department, and even if they had been we are of opinion that it was not in the province of the Navy Department, or of any of its officers, to pass upon the rights of the plaintiff and to declare that he had expatriated himself, and thereby to dismiss him from the Navy, and take from him his retired pay to which he was entitled under the law, and which he had earned by long active service in the Navy. The act of March 2, 1907, was only intended to authorize the State Department to refuse to extend its protection to citizens who, having remained in a foreign country two or five years continuously, failed to satisfy the officers of the State Department that they intended to return to and reside in the United States. The act does not affect any other right.

In the case at bar the plaintiff, when his attention was called to the fact that he had resided in Switzerland, the country of his birth, for more than two years continuously, promptly made the affidavit required of him by the consular officer. He complied with the law, although he might well have insisted that he did not come under its provisions, and having complied with it, and rebutted the presumption raised by the statute, he can not now be held to have expatriated himself. He presented satisfactory evidence to a consular officer of the United States of his intention to return to and live in the United States.

The fact that the affidavit was not sent to the Department of State has nothing to do with its force and effect, for, as far as this record shows, it was not necessary to its validity that it should be forwarded to the department. Having once made the affidavit it was not necessary under the provisions of the act to make one every two years.

The facts show that the plaintiff intended to return to the United States to live; and moreover, it is shown that the plaintiff when war was declared promptly tendered his services to his Government.

The court is of opinion that the plaintiff has not expatriated himself, and is still a citizen of the United States. He is therefore

entitled to all his rights as such, and is entitled to his pay as a retired officer of the Navy from May 1, 1916, up to the present time.

The defendant's attorney has asked us to make certain findings based upon affidavits made by certain officers of the Government. These affidavits are merely ex parte statements and are not competent evidence. The persons who made the affidavits could have been examined by the defendant. The fact that they were not leaves the court to infer that the evidence which they might have given would not have stood the test of scrutiny. At all events there is no reason to depart from a long and well established rule.

For the reasons above given the court is of opinion that the plaintiff is entitled to recover. It is so ordered.

Graham, Judge; Downey, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

15 IX. *Judgment of the court.*

At a Court of Claims held in the city of Washington on the twelfth day of June, A. D. 1922, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises find in favor of the plaintiff, and do order, adjudge, and decree that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of ten thousand three hundred and two dollars and fifty-two cents ($10,302.52).

BY THE COURT.

X. *Proceedings after the entry of judgment.*

On September 9, 1922, the defendant filed a motion for new trial under section 175 of the Judicial Code.

On October 16, 1922, said motion for new trial was overruled by the court.

XI. *Defendant's application for an allowance of appeal.*

Filed Dec. 26, 1922.

From the judgment rendered in the above-entitled cause on the 16th day of October, 1922, in favor of claimant, the defendants, by their Attorney General, on the 23rd day of December, 1922, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT H. LOVETT,
J. G. E. *Assistant Attorney General.*

Order allowing appeal.

It is ordered by the court that the defendant's application for appeal in this cause be and the same is allowed.

BY THE COURT.

January 15, 1923.

16 Court of Claims.

(Title omitted.)

Clerk's certificate.

I, F. C. Kleinschmidt, assistant clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court; of the judgment of the court; of the defendant's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this twentieth day of January, A. D. 1923.

[SEAL.]

F. C. KLEINSCHMIDT,
Assistant Clerk, Court of Claims.

(Indorsed on cover:) File No. 29364. Court of Claims.—Term No. 205. The United States, appellant, vs. Alphonso Gay. Filed January 27th, 1923. File No. 29364.)

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, appellant, v. ALPHONSE GAY, APPELLEE. } No. 205.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF AND ARGUMENT FOR THE UNITED STATES.

I.

THE FACTS OF THE CASE.

The appellee herein, Alphonse Gay, was born in Switzerland on May 19, 1856. He was admitted to citizenship of the United States by the United States District Court for the Eastern District of New York on August 4, 1897. After serving thirteen years six months and ten days as an enlisted man in the Navy he, on the 6th day of July, 1899, was appointed by warrant of the President of the United States a warrant machinist in the Navy, the title of which office has been changed by subsequent legislation to machinist. He remained on the active list in the

performance of duty as such warrant officer until November 23, 1908, when he was retired from active service on account of incapacity, to wit, deafness, resulting from an incident of the service. On said date he was transferred to the retired list of the Navy in accordance with the provisions of Section 1453 of the Revised Statutes.

After retirement from active service in the United States Navy, Gay was, on August 9, 1909, granted permission to leave the limits of the United States for one year from September 16, 1909. On August 17, 1910, he was authorized to remain abroad for one year from September 16, 1910. On September 12, 1911, he was authorized to remain beyond the limits of the United States for one year from September 17, 1911. On August 30, 1912, he was authorized to remain beyond the limits of the United States, the date of commencement or period of time not found by the court.

In accordance with the permission so given to him to remain beyond the limits of the United States, Gay sailed for Europe and arrived in Switzerland on October 16, 1909. He kept the Bureau of Navigation informed of his address by letters written annually or oftener, as required by articles 704, 705, and 706, Naval Instructions, 1913.

The appellee was registered as an American citizen at the American consulate at Geneva, in accordance with the provisions of paragraph 172 of the Consular Regulations, as amended by the Executive Order of April 8, 1907, and in accordance with the circular

letter of the Secretary of State of date April 19, 1907, to the Diplomatic and Consular Officers of the United States. He was so registered on November 12, 1909, and was given a Certificate of Registration. Said Certificate of Registration was renewed on November 21, 1910, and November 21, 1911.

The findings of the Court of Claims, set out on page 6 of the record, with regard to the events thereafter occurring are as follows:

> On November 25, 1912, the plaintiff called at the U. S. Consulate at Geneva and requested a renewal of his registration certificate. The vice consul informed him that since he had lived over two years in Switzerland, the country of his birth, he would have to sign an affidavit to overcome the presumption of expatriation. The plaintiff duly signed such affidavit and on November 26, 1912, he called again at the consulate and asked that the affidavit be not sent to the Department of State.

There is no finding by the court below that Gay ever asked and secured, after November 25 and 26, 1912, a renewal of his registration certificate, up to and including the 24th day of May, 1917, the date of filing his original petition in the Court of Claims. There is no finding by the court that the said Gay, after the attempt which he made on November 25, 1912, to seek to rebut the presumption of expatriation, made up to the time of filing of his petition, or after said date up to the time of finding a judgment in his favor by the court below, any further attempt

to overcome the presumption of expatriation. There is no finding by the court below (and under the evidence there could not have been) that Gay has at any time since 1909, returned to the United States.

On June 19, 1916, and again on July 25, 1916, Gay was notified by the pay officer of the New York Navy Yard, who had been carrying his accounts and paying him his monthly retired pay, that said pay officer had been directed by the Navy Department to make no further payments to him. Gay's name appeared continuously in the official published annual "register of the commissioned and warrant officers of the Navy and Marine Corps," down to and including that of January 1, 1917, where he is carried as a machinist on the retired list of the Navy, and under the column "Present Residence or Duty" he is registered "Abroad." There is no finding that since said time Gay's name ever appeared in the official register.

Gay thereupon, on May 24, 1917, filed his original petition in the Court of Claims setting up that from and after the 1st day of May, 1916, he had received no pay whatever and that he was entitled from that date to pay as a retired machinist at the rate of $1,687.50 a year, as provided by statute, and that he therefore prayed judgment for the same. On June 12, 1922, the lower court gave him judgment for $10,302.52.

THE LAW IN THE CASE.

The Act upon which the appellant relies for reversal of the findings and judgment of the Court of Claims is the Act of March 2, 1907 (34 Stat. 1228),

being entitled "An Act in reference to the Expatriation of Citizens and their Protection Abroad."

Citizenship in a state originally depended on and was governed by descent. The child of an Englishman was an Englishman, wherever he might be born on the face of the earth, and was recognized as such not only by his own people or Sovereign but by others. This is the oldest rule by which citizenship is determined and it still flourishes in lands which were not affected by the rise of feudal institutions.

The second rule of citizenship was as follows: He who is born on the soil which is under the jurisdiction of Prince or Republic is a subject of said Prince or a citizen of said Republic.

This rule arose with the adoption of feudal institutions and prevailed, in lands where such institutions flourished, jointly with the old rule. Citizenship involved reciprocal rights and obligations on the part of the citizen toward the State and of the State or Sovereign toward the citizen. These rights and obligations created a status which, under usual and normal conditions, could not be destroyed unless by the mutual consent of the Sovereign and of the citizen.

From very early times, however, the right of citizenship was granted by the Sovereign to those of alien birth, by their naturalization, either by special act or under general legislation. The original sovereign, however, who claimed the citizen, who was thus naturalized in a foreign state, did not forego his rights unless such naturalization had taken place

with his consent, and thus there might and did arise not only dual, but triple citizenship.

The first country that asserted the right of the individual to throw off his citizenship and his allegiance to his sovereign without the consent of the sovereign was the United States. The position taken by the United States was crystalized into law by the Act of July 27, 1868 (15 Stat. 233). The portion of said Act which is material in this case, being the preamble and the first section of the Act, is set out as Section 1999 of the Revised Statutes in the following words:

> Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas, in the recognition of this principle, this Government has freely received emigrants from all nations and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subject to foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disallowed: Therefore, any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation is declared inconsistent with the fundamental principles of the Republic.

This declaration, with regard to the right of expatriation, by the Government of the United States was not effective or binding upon other nations. The acceptance of the principle by other governments has only been obtained by treaty. Such recognition and acceptance of this principle has been obtained by treaties with many of the nations of the earth. So far as European nations are concerned, the nations who have accepted the principle laid down by the United States are the following, in the order in which the treaties made with them were proclaimed by the President of the United States:

The North German Confederation;
Bavaria;
Belgium;
Hesse;
Baden;
Wurttemburg;
Great Britain;
Austria-Hungary;
Norway and Sweden;
Denmark; and
Portugal.

No other nation of Europe has accepted the principle that the citizen has an inherent right, without the consent of his Sovereign, to expatriate himself and become naturalized in a foreign land.

The various attitudes of governments upon this subject may be summarized under the following six types:

A. The right of voluntary expatriation is wholly denied. A subject has no right to leave the territory of his origin without the express permission of his sovereign; he may not renounce his original allegiance or assume another, and upon his return to the jurisdiction of his origin he is liable to arrest and punishment. (For example, this is the attitude of Russia and Turkey.)

B. The right of expatriation is admitted, provided there exists at the time no unperformed obligation to military service; but, in case this obligation exists, naturalization in a foreign country obtained before it is discharged is considered as void. (For example, this is the attitude of France.)

C. The right of expatriation is admitted, but naturalization in a foreign country does not become valid from the point of view of the country of origin without an express and formal renunciation of the original citizenship made in the country of origin and in accordance with its forms of law. (For example, this is the attitude of Switzerland.)

D. The right of expatriation is admitted, but, while naturalization abroad is freely allowed, in case of a return to the country of origin, the person thus naturalized is not denied the rights of citizenship in that country, but is permitted without further formality to retain his rights as a citizen as if he had never departed from the country. (For example, this is the attitude of Venezuela.)

E. The right of expatriation is admitted, and citizenship absolutely ceases (although it may after-

wards be legally recovered) at the moment when the act of naturalization in a foreign country is performed. (This is the attitude of the majority of foreign governments.)

F. The right of expatriation is admitted and is assumed to have been accomplished when a citizen absents himself from the parent country for a prolonged period of years. (For example, this is the attitude of the Netherlands.)

In consequence of the flood of immigration from Southern and Eastern Europe, that began in 1880, and of the fact that many of the immigrants so coming into the United States became naturalized citizens of the United States, and then returned to the land of their nativity and continued to remain therein or in other foreign countries without ever returning to the United States, the question of protection of such naturalized citizens became a grave one.

The 59th Congress in its Second Session passed a resolution upon the subject, and under the Resolution the House Committee on Foreign Affairs requested a consideration of the subject and a suggestion of appropriate legislation from the Department of State. The entire subject was taken up and treated by the Department of State in a report submitted to the Committee on Foreign Affairs by the Secretary, which report was published as House Document No. 326, 59th Congress, 2d Session. Following the full and exhaustive treatment of the laws, not only of the United States but of foreign states on the subjects of citizenship and expatriation contained in said report,

the said Congress passed the Act of March 2, 1907 (34 Stat., 1228). Said Act here follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of State shall be authorized, in his discretion, to issue passports to persons not citizens of the United States as follows: Where any person has made a declaration of intention to become such a citizen as provided by law and has resided in the United States for three years a passport may be issued to him entitling him to the protection of the Government in any foreign country: *Provided*, That such passport shall not be valid for more than six months and shall not be renewed, and that such passport shall not entitle the holder to the protection of this Government in the country of which he was a citizen prior to making such declaration of intention.
>
> SEC. 2. That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.
>
> When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however*, That such presumption may be overcome on the presentation of

satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also*, That no American citizen shall be allowed to expatriate himself when this country is at war.

SEC. 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

SEC. 4. That any foreign woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital relation if she continue to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad she may retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation.

SEC. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: *Provided*, That such naturalization or resumption takes place during the minority of such child: *And provided*

further, That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States.

SEC. 6. That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section 1993 of the Revised Statutes of the United States and who continue to reside outside of the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority.

SEC. 7. That duplicates of any evidence, registration, or other acts required by this act shall be filed with the Department of State for record.

The second section of this Act sets forth that the presumption of expatriation may be overcome "on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe." In consequence, under the authority of said Act, the Secretary of State issued certain rules and regulations to govern the actions of diplomatic and consular officers in considering the question of expatriation of American citizens. On

April 19, 1907, he issued his first instructions directed to the diplomatic and consular officers of the United States. Therein is set out the following paragraphs:

> When a naturalized citizen of the United States has resided for two years in the country of his origin, or for five years in any other country, this fact creates a presumption that he has ceased to be an American citizen, but the presumption may be overcome by his presenting to a diplomatic or consular officer proof establishing the following facts:
>
> (*a*) That his residence abroad is solely as a representative of American trade and commerce, and that he intends eventually to return to the United States permanently to reside; or
>
> (*b*) That his residence abroad is in good faith for reasons of health or for education and that he intends eventually to return to the United States to reside; or
>
> (*c*) That some unforeseen and controlling exigency beyond his power to foresee has prevented his carrying out a bona fide intention to return to the United States within the time limited by law, and that it is his intention to return and reside in the United States immediately upon the removal of the preventing cause.
>
> The evidence required to overcome the presumption must be of the specific facts and circumstances which bring the alleged citizen under one of the foregoing heads, and mere assertions, even under oath, that any of the enumerated reasons exist will not be accepted as sufficient.

> Whenever evidence shall be produced to overcome the presumption of expatriation from residence abroad, as indicated in this instruction, the affidavit or affidavits must be made in duplicate, one copy thereof being sent forthwith to this Department, and if the affidavits or other evidence have been presented to a consular officer he shall notify the embassy or legation in the country in which he is resident of the name of the person and of the facts concerning his residence abroad.

On the same date, April 19, 1907, a circular was addressed by the Secretary of State to the diplomatic and consular officers of the United States on the subject of registration of American citizens. It prescribed that certificates of registration may be issued and shall be effective for a period of one year, and that "American citizens resident abroad are required to register each year." The form of the Certificate of Registration is set out in said circular letter of the Secretary of State.

On March 2, 1908, there was prepared and sent out a circular letter from the Secretary of State on the subject of applications for registration and on the subject of the necessary facts to rebut the presumption of expatriation. With regard to the subject of expatriation the following statement is made in said letter:

> * * * whenever an applicant against whom the presumption of expatriation lies submits evidence to overcome the presumption, this evidence must be in the form of an

affidavit or affidavits, made in duplicate. For the convenience of consuls a form of affidavit for this purpose has been prepared to be used in these cases, and I enclose herewith a copy. Whether or not the affidavit to overcome the presumption of expatriation shall be supported by corroborative evidence, must depend upon the consul's judgment applied to each case. When the consul has reason to believe the truth of the applicant's affidavit setting forth specific facts and circumstances which are sufficient to overcome the presumption of expatriation, corroborative evidence need not be required, but the consul should state that the facts alleged in the affidavit are true according to his information and belief. When the consul can not make this statement he should require evidence to corroborate the applicant's affidavit, and he should report whether the affidavit and the corroborative evidence are satisfactory proof to him that the applicant has overcome the presumption of expatriation.

The form of affidavit accompanying this circular letter of March 2, 1908, is as follows:

(Form No. 213–Consular.)
(February, 1908.)

AFFIDAVIT TO OVERCOME PRESUMPTION OF EXPATRIATION.

A naturalized citizen may overcome the presumption of expatriation by presenting satisfactory evidence establishing the following facts: (*a*) That his residence abroad is

solely as a representative of American trade and commerce, and that he intends eventually to return to the United States permanently to reside; or, (*b*) that his residence abroad is in good faith for reasons of health or for education, and that he intends eventually to return to the United States to reside; or, (*c*) that some unforeseen and controlling exigency beyond his power to foresee has prevented his carrying out a bona fide intention to return to the United States within the time limited by law, and that it is his intention to return and reside in the United States immediately upon the removal of the preventing cause.

I, ——— ———, a naturalized and loyal citizen of the United States, do solemnly swear that I last left my domicile in the United States at ——— on or about the —— day of ———, 1——; that I have since resided temporarily at ———; that I arrived in ———, where I am now temporarily residing, on the —— day of ———, 1——, my reasons for such residence being as follows: ———; and that I intend to return to the United States permanently to reside within ——— months (years) or when ———.

——— ———.

Subscribed and sworn to before me at ——— this —— day of ———, 1——.

[SEAL] ——— ———,

American ———.

The facts recited in the foregoing affidavit are true to the best of my information and belief, and are satisfactory evidence to over-

come the presumption that the affiant has ceased to be an American citizen.

———— ————,

American ————.

THE TREATY OF 1850 WITH THE SWISS CONFEDERATION.

The United States entered into a treaty with the Swiss Confederation, which was proclaimed by the President of the United States on November 9, 1855. Said Treaty has ever since been effective. The 4th Article of said Treaty is relied upon by the United States in supporting its contention in this case. Said Article is to be found on page 1765, Vol. 2 of Malloy's Treaties, Conventions, etc., between the United States and other powers, 1776–1909. It reads as follows:

> In order to establish their character as citizens of the United States of America or as citizens of Switzerland, persons belonging to the two contracting countries shall be bearers of passports or of other papers in due form, certifying their nationality, as well as that of the members of their family, furnished or authenticated by a diplomatic or consular agent of their nation, residing in the one of the two countries which they wish to inhabit.

QUESTIONS INVOLVED.

The real issue in this case is whether or not Gay is a citizen of the United States. This involves the following questions:

1. Did Gay come within the provisions of the Act of March 2, 1907?

2. Did Gay comply with the provisions of the Act of March 2, 1907?

Under the second question there are involved the following:

(*a*) Did the actions of Gay on November 25 and 26, 1912, constitute a compliance with the provisions of the Act of March 2, 1907, and the rules and regulations prescribed under the requirements of said Act by the Department of State?

(*b*) After having made the alleged attempt on November 25 and 26, 1912, to comply with the provisions of the Act, was it necessary for Gay to present anew satisfactory evidence every two years in order to overcome the presumption of expatriation, and did the said appellee so present such evidence every two years?

3. Was the action of the Navy Department in striking the name of the appellee from the list of retired officers of the Navy and depriving him of further pay as such officer, within the authority and right of the Navy Department?

ARGUMENT.

I.

We think the Court erred when it said in its opinion: "From the facts proved it appears that the plaintiff does not come within the provisions of the Act."

The Court, in reaching this conclusion stated as follows:

> He (Gay) was an officer of the United States Navy who went abroad with the permission of the Navy Department; that per-

> mission was repeatedly renewed and while living in Switzerland under this permission of the Department his pay as such officer is taken from him without any reason therefor being given to him * * * The Act of March 2, 1907, was only intended to authorize the State Department to refuse to extend its protection to citizens who, having remained in a foreign country two or five years continuously, failed to satisfy the State Department that they intended to return to and reside in the United States. The Act does not affect any other rights.

The Court furthermore, discussing the Act, held:

> The purpose of the Act is to relieve the Government of the obligation to protect citizens residing abroad after the limit of two or five years, when their residence there is not shown to be of such a character as to warrant the presumption that they intended to return and reside in the United States. After the time limit has expired it is presumed that the citizen does not intend to return, and it is necessary, in order that he may have the protection of this Government, for him to show affirmatively that his bona fide intention is to return to the United States to live. The essential thing under the Act is the intention to return to and reside in the United States. Op. Atty. Gen. 28, 504, 508, 509. The provisions of the Act are penal and are not to be extended to include any person not within its purview.

We think the Court below has erred in its reasoning as to the intent and purpose of the law of 1907, and as to the effect of the law, and as to the persons who fall under its provisions. This is clearly seen in the last statement made by the Court, that the essential thing under the Act is the intent to return to and reside in the United States, and the provisions of the Act are penal and are not to be extended to include any person not within its purview.

The only light that can be thrown on the intention of Congress in passing the Act is contained in the Congressional Record, 59th Congress, 2d Session, pages 463–467, and the reports, first, of the House Committee on Foreign Relations, being No. 6431, and the Senate Committee on Foreign Relations, being No. 7299. The attention of the court is called to the same. Briefly, to quote the statement made by Mr. Perkins in charge of the Bill in the House:

> The Act provides that where a naturalized citizen shall for five continuous years absent himself from this country the presumption shall arise that he intends to renounce his citizenship. He may overcome that presumption if he can convince the proper officers that there is sufficient reason for his act, that he still intends to be one of us; that he intends to return here; that he is a citizen and expects to remain a citizen of the United States.

In the Bill as originally introduced in the House, Section 3 is the same as Section 2 of the Act with the exception that instead of the words of the

Act, "shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state," the Bill originally contained the words, "shall have resided for five years continuously in a foreign state."

The question was raised in the debate in the House that the Bill, as presented, under its terms did not give the naturalized citizen an opportunity to be heard before his citizenship is considered forfeited. Mr. Bonynge, in the debate, stated:

> I believe, however, that there ought to be some proceeding by which he, the naturalized citizen, could be deprived of those benefits (acquired by virtue of naturalization) and an opportunity to be heard exactly as is provided in the Bill of the last session—that the proceeding ought to be instituted in court to set aside the certificate of naturalization.

Mr. Crumpacker, in the debate upon the Bill, stated that while the State Department had been in the practice of withholding from citizens long resident abroad the protection which was usually accorded citizens in foreign countries, that—

> Now, this section provides that if one who has been naturalized goes abroad and remains for five years, it shall be presumed that he ceases to be an American citizen. What does that mean? He is no longer a citizen. It involves all his rights. It involves the right of protection while he is abroad, it involves the rights he may have acquired under the property and inheritance laws of the United

> States here at home. It de-citizenizes him, while the policy of the State Department does not do that excepting in so far as it relates to the protection of citizens while they are in foreign countries.

Mr. Lowden, in the debate, stated:

> Under the law as it is in force now there are other methods of surrendering citizenship besides swearing allegiance to some other country. The decisions are numerous that either a native-born American or a naturalized alien may by his own act voluntarily surrender his American citizenship. The decisions are numerous that a native-born American who goes abroad with the intention to abide there permanently does lose his citizenship in America without any other act whatever. It has also been held in mumerous decisions that a foreign-born citizen who leaves this country after an absence of a number of years will be presumed to have abandoned his citizenship. No distinction is made between the American-born citizen and a foreign-born citizen beyond this, that a presumption has been indulged in in the case of a foreign-born citizen that he intends to remain away permanently.

This Court in the case of *Mackenzie* v. *Hare* (239 U. S. 299, 307) considered the third section of this Act and determined its proper construction. The Court said, Justice McKenna delivering the opinion:

> Upon the construction of the act it is urged that it was not the intention to deprive an American-born woman, remaining within the

jurisdiction of the United States, of her citizenship by reason of her marriage to a resident foreigner. The contention is attempted to be based upon the history of the act and upon the report of the committee upon which, it is said, the legislation was enacted. Both history and report show, it is asserted, "that the intention of Congress was solely to legislate concerning the status of citizens abroad and the questions arising by reason thereof."

Does the Act invite or permit such assistance? Its declaration is general "that any American woman who marries a foreigner shall take the nationality of her husband." There is no limitation of place; there is no limitation of effect, the marital relation having been constituted and continuing. For its termination there is provision, an explicit provision. At its termination she may resume her American citizenship if in the United States by simply remaining therein; if abroad, by returning to the United States, or, within one year, registering as an American citizen. The Act is therefore explicit and circumstantial. It would transcend judicial power to insert limitations or conditions upon disputable considerations of reasons which impelled the law, or of conditions to which it might be conjectured it was addressed and intended to accommodate.

Whatever was said in the debates on the bill or in the reports concerning it, preceding its enactment or during its enactment, must give way to its language, or, rather, all the reasons that induced its enactment, and all of

> its purposes must be supposed to be satisfied and expressed by its words, and it makes no difference that in discussion some may have been given more prominence than others, seemed more urgent and insistent than others, presented the mischief intended to be remedied more conspicuously than others.

Following the reasoning and the principles laid down by the Supreme Court, let us consider the terms of the Act. The terms are general without any exception whatever. They apply to "any naturalized citizen who shall have resided for two years in the foreign state from which he came or for five years in any other foreign state." There is no exception set out in the Act which provides that any naturalized citizen does not come within its purview, and the Court can not therefore properly hold that it does not apply to every naturalized citizen. The contention of the Court below that it does not apply to the plaintiff Gay, under the facts they recite, we think is not well founded.

Gay was a naturalized citizen of the United States. He was not in active service, and so far as his connection with the Navy was concerned he was a retired officer liable only to be called to service in time of war. He was obliged under Articles 704 and 705 of the Naval Instructions, 1913, to report to the Bureau of Navigation his address yearly. The Court found that he did so report.

In connection with the statement of the Court in its findings of fact that Gay was authorized to

remain abroad indefinitely, on August 30, 1912, by the Navy Department, the attention of the Court is drawn to the general regulations of the Navy Department on the subject of authorization to remain abroad. Article 3701, Naval Instructions, 1913, provides, "permission to leave the United States will be granted by the Secretary of the Navy only." Article 705 of the Naval Instructions of 1913, does not, as affecting retired officers of the Navy, appear in any previous naval instructions or regulations. Said Article 705 provides, with regard to officers on the active list, that they can not change their residence without the permission of the Department (Bureau of Navigation) or commandant, Marine Corps. Subsection 3 of said Article 705 provides, with regard to officers on the retired list, as follows:

> Officers on the retired list may change their residence, or travel abroad, without specific permission from the Department, but they shall keep the Bureau of Navigation or Commandant, Marine Corps, informed of their address.

When Gay applied, in August, 1912, for permission to leave the limits of the United States, the rule that was embodied in the Naval Instructions issued in 1913, with regard to retired officers, was under consideration, and the rule was altered, and required that Gay should no longer be obliged to apply for leave to travel or to remain abroad. It was in consequence thereof that in compliance with said letter of Gay, he was authorized to remain beyond the

Minnesota State ... Co.
St. Paul, Minn.

limits of the United States. There was no further necessity imposed upon him, after the issuance of the Naval Instructions of 1913, to secure permission from the Department to change his residence or to travel abroad. All that he was required to do was to keep the Department informed as to his residence.

Further, the Act specifically provides that, when any naturalized citizen has resided abroad for two or five years, it shall be presumed he has ceased to be an American citizen and that the presumption can only be overcome in a certain manner which is set out in the Act. The terms of the Act are clear and can admit of only one construction. Under the circumstances indicated it shall be presumed that the naturalized citizen has expatriated himself, and having ceased thus to be an American citizen he can only regain citizenship and his rights as a citizen in the same manner and in the same way that any alien can secure it. Having expatriated himself he has ceased to be a citizen for all purposes and not simply for one or more purposes, as may be read into the Act. Furthermore, the law will not admit of the possibility of a suspension of American citizenship; so that he shall be presumed to have ceased to be an American citizen and then that he shall regain the rights of American citizenship under certain conditions; as, for example, his return to the United States.

It has been held that such is the true and proper construction of the Act, by a series of decisions in the lower courts of the Union. The opinion of the

Attorney General (28 Op. Atty. Gen. 504) has, under the reasoning of the Supreme Court in the Mackenzie case, been considered as reversed and it has been held by force of the statute, if naturalized citizens have not, at the end of two or five years residence in foreign lands, rebutted the presumption in the manner prescribed in the statute, that they ceased to be American citizens by reason of long continued residence in foreign lands.

United States ex rel. Anderson v. *Howe* (231 Fed. 546).

Schmidt v. *Miller* (Sup. Ct. District of Columbia, Jan. 23, 1921).

Sinjen v. *Miller* (281 Fed. 889; 289 Fed. 388).

United States v. *Bolton* (U. S. District Court Southern District of Ohio, Dec. 26, 1922).

Thorsch v. *Miller* (Sup. Ct. Dist. of Columbia, Dec. 1923).

In these later cases the question was considered in connection with the citizenship of parties suing the Alien Property Custodian. In them it has been held that the second paragraph of Section 2 of the Act of March 2, 1907, was something more than a mere rule to guide the Department of State in extending or withholding protection in the case of naturalized citizens who have resided for two years in their native land, or for five years in any other foreign country. It has been held that a naturalized citizen, who is still residing abroad and who has failed to overcome the statutory presumption, must be regarded as having ceased to be a citizen of the

United States and therefore as not being entitled to the recovery of his property. While the courts have been lenient and have held on one ground or another that the presumption of loss of citizenship was overcome, the important point to note is that in all of these cases the court assumed that until the statutory presumption was overcome the persons concerned should be regarded as having ceased to be American citizens.

These alien property cases are also based and founded upon the 21st Section of the Act of Congress of March 4, 1923, "to amend the Trading with the Enemy Act" (42 Stat. 1511). Said section runs as follows:

> SEC. 21. That the claim of any naturalized American citizen under the provisions of this Act shall not be denied on the ground of any presumption of expatriation which has arisen against him, under the second sentence of section 2 of the Act entitled "An Act in reference to the expatriation of citizens and their protection abroad," approved March 2, 1907, if he shall give satisfactory evidence to the President, or the court, as the case may be, of his uninterrupted loyalty to the United States during his absence, and that he has returned to the United States, or that he, although desiring to return, has been prevented from so returning by circumstances beyond his control.

It is clear that the provision in this Act which permits the rebuttal of the presumption of expatriation by the giving of "satisfactory evidence to the President, or the Court," leads necessarily to the

contention which the Government here makes that Section 2 of the Act of 1907 provided the only way of rebutting the presumption of expatriation. Otherwise there would be no necessity of making the provision which is made in Section 21 of the Act of 1923, if under the Act of 1907 other ways in which such rebuttal could be made were possible and could be taken.

In *Ex parte Griffin* (237 Fed. 445), construing this section of the Act of March 2, 1907, with reference to the conduct of the petitioner in that case, it was held by the Court that this was complete expatriation and so declared by the Act of Congress above quoted. The Court held that—

> Clearly a person could not hold allegiance to two different, absolute, and independent Governments at the same time.

That—

> The sovereign power through Congress may declare that the doing of certain acts is inconsistent with citizenship of the United States and shall constitute expatriation; that it follows that such acts if voluntarily done constitute loss and abandonment and voluntary renunciation of citizenship in the United States; that if not so the statute is meaningless and worthless and Congress is powerless to declare what acts constitute expatriation. Every citizen is presumed to know the law and to understand the effect of his voluntary acts. When he voluntarily does the acts which the law says operate as expatriation, we have the necessary assent.

The statute having provided the way in which the presumption of expatriation might be rebutted, that way must be followed. Above all, if the attention of the naturalized citizen has been called to the necessity of his rebutting the presumption and he has failed to make such rebuttal, then it is clear that the courts, when the question arises, will hold that he has failed to rebut the presumption in the manner prescribed by law and so has forfeited his citizenship.

> If a new power be given by an affirmative statute to a certain person, all other persons are in general excluded from the exercise of the power, since *expressio unius est exclusio alterius.* (Sedgwick on Constitutional and Statutory Law.)

19 Cyc. 26:

> Wherever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative; namely, that the thing shall not be done otherwise.
>
> *State* v. *Arnold*, 140 Ind. 628.
>
> *Ray* v. *Great Falls Mfg. Co.*, 38 N. H. 442.
>
> *In re Atty. Gen.*, 2 N. M. 49.

The statute having prescribed the manner in which the presumption is to be rebutted, said way must be followed.

Lastly, it is to be noted that under the provision of Article 4 of the Treaty with Switzerland Gay was obliged to be a bearer either of a passport or "of other papers in due form, certifying his nationality as well as that of the members of his family, furnished

or authenticated by a diplomatic or consular agent" of the United States, residing in Switzerland. It is well known, and the Court will take notice of the fact, that the practices of European nations require strangers taking up residence within their limits to report themselves to the proper authorities in order that their character may be established and their right to reside within such foreign state is proven. Under this provision of the Treaty Gay was obliged to secure, on assuming his residence in Switzerland, papers certifying to his nationality and that of the members of his family. He applied for the same and was obliged to apply for it, or else not be permitted to remain in Switzerland claiming American citizenship. This article of the Treaty with Switzerland was what obligated Gay to apply for his certificate of registration, which was good for simply one year. He renewed the same yearly up to November, 1912.

When he then applied for a new certificate of registration he unquestionably fell under the provisions of the law of 1907, and the consular agent could not issue such a certificate to him unless under the rules and regulations prescribed by the State Department Gay rebutted the presumption of expatriation. This, as will afterwards be shown, he failed to do, and as afterwards will be shown he never, from 1912 until the filing of his petition, secured under the terms of the Treaty papers in due form certifying to his nationality, furnished and authenticated by a diplomatic or consular agent of the United States. Yet Gay during

all of this period was resident in Switzerland, not in the active service of the United States, but a retired officer, and he clearly fell under the requirements of Article 4 of the Treaty with Switzerland and of the law of 1907. If the reasoning of the Court below is correct that a retired officer of the Navy does not fall under this law, because of the possibility of his being called into service, then under the provisions of the statute setting up and establishing under the Department of the Navy "A Naval Reserve Force consisting of some six classes (39 Stat. 587)," which provided that the officers of said Naval Reserve Force may be ordered into active service in the Navy by the President in time of war or when in his opinion a national emergency exists; and making further provisions for imposing duties and obligations upon them and providing for pay and compensation for the same in time of peace, then all of the officers of the Naval Reserve Force do not fall within the provisions of the Act of 1907, and of Article 4 of the Treaty with Switzerland.

It is clear, therefore, that even though the terms of the Act of 1907, and of Article 4 of the Treaty with Switzerland were ambiguous instead of being clear, explicit, and circumstantial, that under any construction of the possible intent of Congress and of the Treaty-making power of the United States in enacting said law or making said Treaty, that retired officers of the Navy fall under the provisions of the Act and were intended to fall under the provisions

of said Act and said Treaty when, if naturalized citizens, they took up their residence in foreign States.

II.

The Court erred in finding for the plaintiff below, because the Court found, that by his actions on November 25 and 26, 1912, plaintiff complied with the provisions of the Act of March 2, 1907, and that "Having complied with it and rebutted the presumption raised by the statute, he can not now be held to have expatriated himself."

The Court, in its opinion, said:

> In the case at bar the plaintiff, when his attention was called to the fact that he resided in Switzerland, the country of his birth, for more than two years continuously, promptly made the affidavit required of him by the consular officer. He complied with the law, although he might well have insisted that he did not come under its provisions, and having complied with it, and rebutted the presumption raised by the statute, he can not now be held to have expatriated himself. He presented satisfactory evidence to a consular officer of the United States of his intention to return to and live in the United States.

The Court, however, in its findings of fact failed to find sufficient facts to show that Gay had complied with the Act. The sole finding of fact of the Court is that on November 25, 1912, when Gay called at the Consulate at Geneva and requested a renewal of his registration certificate, he was informed that he

would have to sign an affidavit to overcome the presumption of expatriation. In the words of the Court: "The plaintiff duly signed such affidavit." On the next day, November 26th, Gay called again at the Consulate and asked that the affidavit be not sent to the Secretary of State. These are the sole facts found by the Court, as to what occurred on November 25 and 26, when, as the Court states in its opinion, Gay complied with the provisions of the Act.

The Court below did not find in its findings of fact that Gay, in the terms of the law, presented satisfactory evidence to a diplomatic or consular officer of the United States under such rules and regulations as the Department of State may prescribe. Neither did it make such findings of fact as would show that Gay did so present satisfactory evidence.

The rules and regulations which, under the second section of the Act, the Department of State prescribed, set out plainly what proofs were necessary and must be presented to the officer of the United States so that he could upon it make a finding that satisfactory evidence had been presented. The affidavit of the naturalized citizen was the first step that, under the instructions and rules of the Department of State, the plaintiff must present. By this affidavit, under said rules, he had to establish certain facts bringing him within one of three special classes. If the consular officer did believe that the facts recited were true and were satisfactory evidence to overcome the presumption, he was obliged to make statement

under the rule to that fact at the bottom of the affidavit signed by the naturalized citizen.

In his rules and regulations the Secretary goes on to state that, in the judgment of the consular officer, corroborative evidence to support the affidavit may be required. The consul is obliged, under the rules, to make duplicate copies of all papers in the case and send all duplicate copies, in accordance with the requirement of Section 7 of the Act, to the Department of State.

It is evident from the fact found by the Court that Gay asked that the affidavit be not sent to the Department of State, that Gay was familiar with the requirements of the law. The Court did not find that Gay fell, by the statements in his affidavit, within either of the three classes whose affidavit could be accepted by the Consul as rebutting the presumption of expatriation. Neither is there any finding by the Court, or any fact showing that Gay fell in any one or other of these classes. There is no finding by the Court that the Consul signed the certificate, which he was required to sign in case he was satisfied, at the bottom of the affidavit of Gay. There is further no finding of the Court that the Consul in any way or manner determined that the evidence was satisfactory to rebut the presumption of expatriation.

Lastly, the action of Gay on November 26th, requesting that the affidavit be not sent to the Department of State is evidence conclusive that he desired to revoke and cancel any attempt he made to comply with the requirements of the Act.

Thus, under the findings of fact made by the Court, it is impossible to conclude that Gay complied with the law and rebutted the presumption raised by the Statute. If there was any evidence to sustain such opinion of the Court and prove the existence of the necessary facts, the Court has failed in its conclusions of fact to find that such evidence was produced or that such facts existed. Thus, if Gay was bound to comply with the law, the Court has not found in its findings of fact sufficient facts to show that Gay did so comply with the law.

III.

The Court erred in finding for the plaintiff, because, in the language of the Court, "having once made the affidavit (being the affidavit which he, Gay, attempted to make in order to substantiate his claim that he had not expatriated himself), it was not necessary under the provisions of the Act to make one every two years."

The third position taken by the Court to sustain its judgment in favor of Gay is, that having once made the affidavit to rebut the presumption of expatriation, under the provisions of the Act Gay was not required to make one every two years.

This is certainly nullification of the intent and purpose of the Act. Clearly, the Act was intended to prevent the continued residence in foreign lands of naturalized citizens. They were not to make a foreign land their place of residence and so withdraw themselves from the obligations that might be imposed upon them as citizens while residing in the

United States. Further, they were not by so withdrawing themselves to devote their talents and energy to the service of a foreign country and to expend and enjoy, subject to the burdens put upon them in such foreign state, the fruits of their industry or the accumulations of their abstinence.

The expatriation of a citizen under the Act of 1907, depended on the principle that protection and allegiance are reciprocal; that a citizen of the United States who takes up his residence in another country, contributing his labor, talents, or wealth to the support of society there, becomes through the lapse of time a member of the political state existing there, having by his acts withdrawn himself from the duties of citizenship in the United States and consented and tacitly agreed to expatriate himself from the United States and forego his right of citizenship. When a citizen of the United States is domiciled in a foreign country his movable wealth is purposely placed where it may never contribute to the national necessities, and his income is expended for the benefit of a foreign government and his accumulations go to swell its taxable wealth.

If the position of the lower Court is correct, then a naturalized citizen, at the end of two or five years' residence in a foreign land, *once* having rebutted the presumption of expatriation, could continue to remain in such foreign land for the balance of his life and there could be no presumption raised under the Act that he had abandoned his citizenship. It is evident that this was not the intent of Congress and is

not the necessary and plain construction of the Act. The Court, therefore, erred in the position that Gay was not obliged, under the provisions of the Act, to rebut the presumption of expatriation at the end of every two years.

The Court did not find as a fact, and therefore this Court can not conclude that Gay ever made any further attempt, after the abortive attempt of November 25 and 26, 1912, to rebut the presumption of expatriation.

Further, the Court did not find as a fact, and the evidence did not show that Gay after November, 1912, made any further attempt to secure a certificate of registration as an American citizen. Under the provision of Article 4 of the Treaty with Switzerland, and under the well-known and universal custom of foreign nations, without such certificate Gay would not have been permitted by the authorities in Switzerland to remain in said land and continue, as he did, his residence therein. How it was possible for him to continue to reside in Switzerland is evident from the statement of the law of Switzerland, set out on pages 516–524 of House Document No. 326 of the 59th Congress, 2d session.

The pertinent parts of said statement are as follows:

> According to article 8 (of the Federal law regulating the conditions under which a Swiss may renounce his citizenship), the declaration of renunciation of Swiss nationality must be presented in writing, together with

the necessary documents to the cantonal government; the latter gives information thereof to the authorities of the community of origin, for its own benefit as well as all other interested parties, and fixes a delay of not more than four weeks for any opposition thereto. Article 9 further says that, if the conditions mentioned in article 7 have been fulfilled and there has been no opposition, or if the opposition has been removed, the authorities competent, according to the cantonal laws, declare the petitioner released from cantonal and communal citizenship.

The release, which includes the loss of Swiss citizenship as well, dates from the transmission to the petitioner of the sealed document of release.

In consequence of article 44 of the federal constitution, above referred to, a Swiss always remains a Swiss as long as he has not according to Swiss laws voluntarily renounced his communal, cantonal, and general Swiss citizenship and therefore residence in foreign parts in no way affects his citizenship of origin.

Swiss citizens permanently residing in other countries always remain under the protection of the Swiss Government.

It must be remembered that all Swiss citizens from the ages of 20 to 45 are subject to military duty or taxation even though residing abroad. Whenever a Swiss returns to his country of origin he is immediately called upon to pay all his military taxes due during his residence abroad. This also applies to those

> naturalized in a foreign country who have failed to renounce their Swiss citizenship according to Swiss law.
>
> Furthermore, in consequence of article 44 of the federal constitution even a native-born American, son of a Swiss who was a naturalized citizen of the United States at the time of his son's birth, is, if he comes to Switzerland, under the laws of this country regarded as a Swiss if his father has failed to renounce Swiss citizenship in the manner above prescribed, and, therefore, liable to military taxation.

There is no finding, as has been stated, by the Court, that Gay complied with the necessary requirements of the Swiss law in order to renounce his Swiss citizenship. It is therefore evident that when he failed to produce a certificate of registration to the authorities in his place of residence in Switzerland, that they, under the Swiss law, must have treated and considered him a Swiss citizen.

It can not be claimed under the facts found by the Court below of Gay's continued registration up to November, 1912, and application for a certificate of such registration, and of Gay's familiarity with the Act of 1907, as disclosed in the findings of fact by the Court, that Gay was unaware of the requirements of the law of 1907, and the Treaty with Switzerland, and the law of Switzerland, and therefore it may be presumed that he voluntarily abandoned any attempt to maintain his American citizenship.

IV.

The Court erred in finding for the plaintiff below because, in the language of the Court, "it was not in the province of the Navy Department, or of any of its officers, to pass upon the rights of the plaintiff and to declare that he had expatriated himself, and to thereby dismiss him from the Navy, and take from him his retired pay to which he was entitled under the law."

The Court below has in finding for Gay attacked the authority of the Secretary of the Navy or its officers to strike Gay from the list of retired officers of the Navy and take from him his retired pay. The position of the Court evidently is that the officers of the Navy Department could not, unless under some judgment of a Court that Gay had abandoned his American citizenship, drop him from the list of retired officers of the Navy. This position is unsound.

There is no question that Gay, in order to retain his position as a retired officer of the Navy, was obliged to remain a citizen of the United States.

Section 1428 of the Revised Statutes provides that—

> the officers of vessels of the United States shall in all cases be citizens of the United States.

The Navy Department reports that this section has for many years been regarded as requiring that officers of the Navy shall be citizens of the United

States. As early as 1893 the following provision was included in the Navy regulations:

> No person shall be appointed to any office in the Navy unless he is a citizen of the United States. (Art. 1682.)

Article 3301, Navy Regulations, 1913, provides that—

> (1) No person shall be appointed to any office in the Navy unless he is a citizen of the United States. * * *

The Navy regulations here cited have the force and effect of law and in consequence there have been uniform requirements that officers of the Navy must be and remain citizens of the United States. An instance where this requirement received the approval and sanction of Congress is found in the Act of May 9, 1914 (38 Stat. 1268). This was an Act passed for the relief of Gordon W. Nelson (a midshipman at the Naval Academy), who was about to graduate from that institution, but who could not under the law be commissioned an ensign in the Navy upon his graduation in view of the fact that he was not a citizen of the United States.

Citizenship being a necessary qualification to hold an office in the Navy, the voluntary abandonment of citizenship is a voluntary abandonment of the office and results in the loss of the same. The general principle is that the loss of a qualification necessary to make one eligible for a political office, will result *ipso facto* in forfeiture of the office. This is particularly true in the case where the loss of the qualifica-

tion is the result of the voluntary action of the officer himself.

In *State ex rel. Cornwell* v. *Allen* (21 Ind. 516) the court decided that an office may be vacated by abandonment or resignation by parole, and the existence of the vacancy in each case must be determined by the facts. In that case Allen had been elected auditor of Vigo County, Indiana. On October 15, 1859, the constitution and laws of Indiana required an auditor for the county not only to be a resident but to actually reside and keep his office in the county. After election and qualification and entry on the duties of his office, Allen enlisted in a regiment of the Indiana Volunteers and was duly mustered into the military service of the United States for three years, or during the war. It was held that this voluntary act, which permanently disabled the officer from performing the duties of his office, amounted to a constructive resignation of his office by abandonment.

In case of *State ex rel. Real* v. *Jones* (19 Ind. 356) it was held that a vacancy may occur in an office by a voluntary removal of the incumbent, living, from the township, county, or State, as the case may be; and this without a judicial declaration of the vacancy. (See also *Prather* v. *Hart;* 17 Nebr. 598.)

Gay could not have been appointed a warrant officer in the Navy excepting he had the qualification of citizenship, and under the well-known rule and principle of the law a qualification which was necessary in order that the party might be appointed

to post or position, must be his during the whole term of holding said post or position. His failure to maintain the same would cause him to lose such post or position and his voluntary act in failing to maintain such qualification would unquestionably cause and bring about the abandonment of such post. There was no way in which the Navy Department could try and determine the question as to whether Gay had expatriated himself, and it was obliged to accept the fact or facts brought to its attention and so determine the status of Gay.

Under resolution of the United States Senate, December 13, 1815 (Annals of Congress, 14th Cong., 1st Session, 1815–1816, pp. 21, 22), it was resolved "that the Secretary of War and the Secretary of the Navy be requested to furnish annually, on the first day of January, each member of the Senate with a copy of the Register of Officers of the Army and Navy of the United States."

It being the duty of the Secretary of the Navy to compile this annual Naval Register, it devolved upon him to determine what names may properly be included therein, and in omitting the name of the plaintiff from the Register the Secretary was exercising his power and duties under the law. Furthermore, the Secretary's action in dropping the plaintiff from the list of retired officers and omitting his name from the Register, on the ground that he had by his own conduct abandoned his office and ceased to be a member of the naval service, was in accordance with a long line of precedents.

It may be suggested that there should have been some determination by a tribunal that Gay had lost his citizenship before he could have been dropped from the list of retired officers and his pay refused him.

There has been cited the provisions of the Act of June 29, 1906, Section 15 (34 Stat. 601) as the proper and sole legal procedure under which it could be determined that Gay had lost his citizenship. A reading of said section shows clearly that proceedings under it can only be begun when the party against whom they are had is within the jurisdiction of the Court. Gay, never having returned within the jurisdiction of a Court of the United States, could not be proceeded against under said section.

It might be said that the Navy Department should have proceeded by court-martial in order to determine as to whether Gay, by loss of American citizenship, had forfeited his right to be held as a retired officer of the Navy. The Navy Department could not, in time of peace, convene a court-martial in a foreign country for the purpose of bringing Gay to trial, even had charges been preferred against him of which a court-martial could take notice. Neither could the Navy Department have convened a court of inquiry, which is the statutory instrument commonly made use of by the Navy for the purpose of investigating and ascertaining facts preliminary to disciplinary or other administrative action. A court of inquiry can not be convened in foreign jurisdictions in time of peace, and it has no jurisdiction over

the residents of foreign countries. The only other formal investigation which, under the statutes, may be conducted by the Navy, is that referred to in Section 183 R. S., as amended and reenacted by the Act of February 13, 1911 (36 Stat. 898), and Sections 184–187 R. S. Those sections would not have afforded a means of conducting an investigation in the present case, where the party and all possible witnesses were resident in a foreign country.

The determination of the question whether a naturalized citizen had expatriated himself under section 2 of the Act of 1907 is a matter purely of executive determination subject to appeal to the court. (*U. S. ex rel. Anderson* v. *Howe.*, 231 Fed. Rep. 546, and *Ex parte Griffin*, 237 Fed. Rep. 445.) In both of these cases cited the determination was made by the Secretary of Labor in ordering the deportation of persons found by his Department to have expatriated themselves under Section 2 of the Act of 1907, and the Secretary's determination of the matter was sustained by the Court.

So long as the Government recognizes the right of its citizens to expatriate themselves in time of peace, the power must be lodged somewhere to determine whether or not such expatriation has taken place, and under the law, as enacted by Congress and construed by the courts, such power is vested in the proper administrative officers, subject to judicial review. Such action of executive officers adverse to the individual concerned does not deny him his day in court. On the contrary, it affords him the opportunity to

secure a judicial determination of his status, which would not otherwise be possible.

The Court below, in its opinion, stated—

> that it was not in the province of the Navy Department, or of any of its officers to pass upon the rights of the plaintiff and to declare that he had expatriated himself and thereby to dismiss him from the Navy, and take from him his retired pay to which he was entitled under the law and which he had earned by long, active service in the Navy.

In *MacKenzie* v. *Hare* the Board of Election passed upon the citizenship of plaintiff, and this Court sustained the finding of the Board.

While retired officers' pay is partly in consideration of past services, it is also in part given in consideration of his availability for future service in time of war and is not at all the same as a pension. In our opinion, the case of *Geddes* v. *The United States* (38 C. Cls. 422), which has been quoted on behalf of Gay's contention, is not a sound expression of law in so far as it holds that the pay of retired officers "is in the nature of a pension for services to this country previously performed." For a complete discussion of the opinion in the Geddes case and the contra authorities thereto see 29 Op. Atty. Gen. 397, 503.

If Gay failed to maintain his citizenship, he clearly lost the right to his retired pay and to his status as a retired officer of the Navy. This because, if he should be called into active service in time of

war, he could not perform such services because of his loss of American citizenship.

It may be noted by the Court that in the second finding of fact made by the Court below, the second paragraph thereof reads as follows:

> He, Gay, has always borne true faith and allegiance to the United States and has done no act inconsistent with his allegiance nor with his status as an officer of the United States Navy.

Sufficient is it to note to the Court that such statement is not a finding of fact but a conclusion of law based upon the reasoning of the Court, which the appellant considers has been completely refuted in the foregoing pages. If, contrary to the opinion of the Court, Gay fell under the provisions of the Act of 1907; if he failed to comply with the provisions of said Act either in 1912 or at any other subsequent date, then Gay, in 1912, ceased to bear allegiance to the United States and ceased to be a retired officer of the United States Navy. The facts as found by the Court are in contradiction with this conclusion which the Court has made, and said conclusion can not be considered as true if the contention and argument made in the foregoing pages are correct.

The question as to whether the Navy Department had authority to pass upon the rights of the plaintiff, and strike him from the list of the retired officers of the Navy, and refuse to grant him his retired pay, so far as the case of Gay is concerned, is of no consequence. Its only pertinence here is whether the

Navy had the right, upon the facts disclosed of Gay having lost his American citizenship, to drop his name from the rolls and to cease his pay as a retired officer.

The point in the case is simply this: Did Gay lose his right as an American citizen in 1912? If he did, then the Secretary of the Navy had the power and authority to drop his name from the list of retired officers. Under the facts as found by the Court below, and under the argument of the question as set forth in the preceding pages, we are of the opinion that there is no doubt that Gay lost his American citizenship and was expatriated by his failure in 1912 to rebut the presumption of expatriation.

The judgment of the Court of Claims should, therefore, be reversed and the petition be dismissed.

JAMES M. BECK,
Solicitor General.

ROBERT H. LOVETT,
Assistant Attorney General.

JOHN G. EWING,
Attorney.

No. 5870.

UNITED STATES OF AMERICA. DEPARTMENT OF STATE.

To all to whom these presents shall come, Greeting:

I certify that the documents hereto annexed are true copies from the records of this Department.

(Communications regarding "Expatriation" dated April 19, 1907, addressed to the Diplomatic and Consular officers of the U. S., signed Elihu Root; "Amendment to Rule (A) to Overcome the Presumption of Expatriation," dated May 14, 1908, addressed to the American Diplomatic and Consular Officers, signed Elihu Root; "Registration of American Citizens," dated April 19, 1907, addressed to Diplomatic and Consular Officers, signed Elihu Root; "Applications for Registration," dated March 2, 1908, addressed to American Consular Officers, signed W. J. Carr; and "Form No. 213—Consular, February, 1908.")

In testimony whereof I, Charles E. Hughes, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said Department, at the City of Washington, this twentieth day of November, 1923.

CHARLES E. HUGHES,
Secretary of State.

By BEN G. DAVIS,
Chief Clerk.

EXPATRIATION.

DEPARTMENT OF STATE,
Washington, April 19, 1907.

To the Diplomatic and Consular Officers of the United States.

GENTLEMEN: Paragraph 144 of the Diplomatic Instructions and Consular Regulations, as amended by Executive order of April 6, 1907, reads as follows:

> 144. EXPATRIATION.—An American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign State in conformity with its laws, or when he has taken an oath of allegiance to any foreign State. When any naturalized citizen shall have resided for two years in the foreign State from which he came, or for five years in any other foreign State, it shall be presumed that he has ceased to be an American citizen, and his place of general abode shall be deemed his place of residence during the said years; Provided, That such presumption may be overcome on the presentation of satisfactory evidence to a Diplomatic or Consular Officer of the United States, under such rules and regulations as the Department of State may prescribe.
>
> An American citizen shall not be allowed to expatriate himself when this country is at war. (Act of March 2, 1907, Sec. 2.)

The text of the law is appended for your information.

Whenever it comes to the knowledge of a diplomatic or consular officer that an American citizen has secured naturalization in a foreign State in conformity with its laws, or has taken an oath of allegiance to a foreign State, such diplomatic or consular officer

should certify to the facts under his seal and should transmit the certification to this Department. If the citizen who has thus acquired foreign naturalization was a naturalized citizen of the United States, the fact should be stated in the certification and the certificate of American naturalization should, if possible, be taken up and forwarded to the Department with the certification. The form of the certification shall be as follows:

> I, A. B., (name and rank of certifying officer) hereby certify that C. B., a citizen of the United States by birth (or naturalization), has secured naturalization as a citizen of ------, the proof of such naturalization being as follows:
>
> (If he was a citizen of the United States by naturalization a statement of the date and place of his naturalization in the United States should follow.)
>
> In testimony whereof I have hereunto signed my name and affixed my seal of office.
>
> [L. S.] ------ ------

When a naturalized citizen of the United States has resided for two years in the country of his origin, or for five years in any other country, this fact creates a presumption that he has ceased to be an American citizen, but the presumption may be overcome by his presenting to a diplomatic or consular officer proof establishing the following facts:

(a) That his residence abroad is solely as a representative of American trade and commerce, and that he intends eventually to return to the United States permanently to reside; or,

(b) That his residence abroad is in good faith for reasons of health or for education, and that he intends eventually to return to the United States to reside; or,

(c) That some unforseen and controlling exigency beyond his power to foresee has prevented his carrying out a bona fide intention to return to the United States within the time limited by law, and that it is his intention to return and reside in the United States immediately upon the removal of the preventing cause.

The evidence required to overcome the presumption must be of the specific facts and circumstances which bring the alleged citizen under one of the foregoing heads, and mere assertions, even under oath, that any of the enumerated reasons exist will not be accepted as sufficient.

Whenever evidence shall be produced to overcome the presumption of expatriation from residence abroad, as indicated in this instruction, the affidavit or affidavits must be made in duplicate, one copy thereof being sent forthwith to this Department, and if the affidavits or other evidence have been presented to a consular officer he shall notify the embassy or legation in the country in which he is resident of the name of the person and of the facts concerning his residence abroad.

So much of this instruction as relates to residence abroad is not applicable to natural-born citizens of the United States. Their status, so far as their right to the protection of this Government is concerned, is governed by existing instructions of this Department and especially by so much of the circular instruction of March 27, 1899, as applies to them, which is appended to this instruction for your information.

I am, Gentlemen, your obedient servant,

ELIHU ROOT.

TEXT OF THE LAW.

Section 2, Act of March 2, 1907:

SEC. 2. That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war.

CIRCULAR OF MARCH 27, 1899.

Passports for persons residing or sojourning abroad.

DEPARTMENT OF STATE,
Washington, March 27, 1899.

To the Diplomatic and Consular Officers of the United States.

GENTLEMEN: * * * A condition precedent to the granting of a passport is, under the law and the rules prescribed by authority of the law, that the citizenship of the applicant and his domicile in the United States and intention to return to it with the purpose of residing and performing the duties of citizenship

shall be satisfactorily established. One who has expatriated himself can not, therefore, receive a passport.

Expatriation has been defined by Mr. Hamilton Fish as "the quitting of one's country, with an abandonment of allegiance and with the view of becoming permanently a resident and citizen of some other country, resulting in the loss of the party's preexisting character of citizenship." Thus, a person "may reside abroad for purposes of health, of education, of amusement, of business, for an indefinite period; he may acquire a commercial or civil domicile there, but if he do so sincerely and bona fide *animo revertendi*, and do nothing inconsistent with his preexisting allegiance, he will not thereby have taken any step towards self-expatriation. But if, instead of this, he permanently withdraws himself and his property and places both where neither can be made to contribute to the national necessities, acquires a political domicile, and avows his purpose not to return, he has placed himself in the position where his country has the right to presume that he has made his election of expatriation." * * *

But even where expatriation may not be established, a person who is permanently resident and domiciled outside of the United States can not receive a passport. "When a person *who has attained his majority* removes to another country and settles himself there, he is stamped with the national character of his new domicile; and this is so, notwithstanding he may entertain a floating intention of returning to his original residence or citizenship at some future period, and the presumption of law with respect to residence in a foreign country, especially if it be protracted, is that the party is there

animo manendi, and it lies upon him to explain it." (Mr. Fish to the President, For. Rels. 1873, 1186, et seq.). If, in making application for a passport, he swears that he intends to return to the United States within a given period, and afterwards, in applying for a renewal of his passport, it appears that he did not fulfill his intention, this circumstance awakens a doubt as to his real purpose, which he must dispel (For. Rels. 1890, 11).

The treatment of the individual cases as they arise must depend largely upon attendant circumstances. When an applicant has completely severed his relations with the United States; has neither kindred nor property here; has married and established a home in a foreign land; has engaged in business or professional pursuits wholly in foreign countries; has so shaped his plans as to make it impossible or improbable that they will ever include a domicile in this country—these and similar circumstances should exercise an adverse influence in determining the question whether or not a passport should issue. On the other hand, a favorable conclusion may be influenced by the fact that family and property connections with the United States have been kept up; that reasons of health render travel and return impossible or inexpedient; and that pecuniary exigencies interfere with the desire to return. But the circumstance which is perhaps the most favorable of all is that the applicant is residing abroad in representation and extension of legitimate American enterprises. * * *

I am, Gentlemen, your obedient servant,

JOHN HAY.

AMENDMENT TO RULE (A), TO OVERCOME THE PRESUMPTION OF EXPATRIATION.

DEPARTMENT OF STATE,
Washington, May 14, 1908.

To the American Diplomatic and Consular Officers.

GENTLEMEN: You are hereby instructed that rule (a), relative to the facts to be established to overcome the presumption of expatriation, prescribed in the circular instruction of April 19, 1907, entitled "Expatriation," and the circular instruction of December 11, 1907, entitled "Expatriation and Protection of Americans in Turkish Dominions," is hereby amended so as to read:

(a) That his residence abroad is solely or principally as a representative of American trade and commerce and that he intends eventually to return to the United States to reside.

I am, Gentlemen, your obedient servant,

ELIHU ROOT.

REGISTRATION OF AMERICAN CITIZENS.

DEPARTMENT OF STATE,
Washington, April 19, 1907.

To the Diplomatic and Consular Officers of the United States.

GENTLEMEN: Paragraph 172 of the Consular Regulations, as amended by the Executive order of April 8, 1907, reads as follows:

> 172. Registration of American Citizens.—Principal Consular Officers should keep at their offices a Register of all American citizens residing in their several Districts, and will therefore make it known that such a Register is kept and invite all resident Ameri-

cans to cause their names to be entered therein. The same general principles govern applications for registry which govern applications for passports. (Paragraph 151.)

The Register should show the date of registration, the full name of the person registered, the date and place of his birth, the place of his last domicile in the United States, the date of his arrival in the foreign country where he is residing and his place of residence therein, the reasons for his foreign residence, whether or not he is married and if married the name of his wife, her place of birth and residence, and if he has children the name, date, and place of birth and residence of each. The nature of the proof accepted to establish his citizenship should also appear, and his signature should be inscribed in the Register.

Consuls may issue certificates of the registration prescribed above for use with the authorities of the place where the person registered is residing. Each certificate shall set forth the facts contained in the Register and shall be good for use for one year only and shall be in a form prescribed by the Secretary of State. (Form No. ——.) When a certificate expires a new one may be issued, the old one being destroyed, if it is clearly shown that the residence abroad has not assumed a permanent character. Persons who hold passports which have not expired shall not be furnished with certificates of registration, and it is strictly forbidden to furnish them to be used for travelling in the place of passports. Returns of all registrations made and of all certificates of registration issued shall be made to the Embassy or Legation in the country in which the Consulate is situated and to the Secretary of State at intervals and under regulations to be prescribed by him. No fee will be charged for registration nor for any service

connected therewith, nor for certificates of registration.

This Paragraph shall go into effect July 1, 1907.

Books for registration are being prepared and will be furnished to consuls as soon as possible. In the meantime, after July 1, consuls will register American citizens, following carefully the requirements of the paragraph quoted above, and will carefully preserve the registrations and enter them in the register of American citizens as soon as the books for that purpose shall have been received.

The certificate of registration shall be in the following form:

I, ---------- (Name of consul.), Consul of the United States of America at ---------- (Name of place.), hereby certify that ---------- (Name of person registered.) is registered as an American citizen in this consulate. He was born ---------- (Date of birth.) at ---------- (Place of birth.) and is a citizen of the United States by (birth or naturalization). He arrived in ---------- (Place of foreign residence.) on ---------- (Date.), where he is now residing for the purpose of ---------- (Reason why residing in foreign place.) He is married to ---------- (Name of wife.), who was born in ---------- (Place of birth of wife.) and resides at ---------- Place of wife's residence.) He has the following children:

---------- (Name of child.) born in ---------- (Place of birth.) on ---------- (Date of birth.) and residing at ---------- (Place of residence.); and ---------- (Name of child.) born in ---------- (Place of birth.) on ---------- (Date of birth.) and residing at ---------- (Place of residence.); and ---------- (Name of child.) born in ---------- (Place of birth.) on ---------- Date of birth.) and residing at ---------- (Place of residence.) His citizenship of the United States is established by ----------

---------- (Nature of proof of citizenship produced.)

This certificate is not a passport and its validity expires on .....

(Date of expiration.)

The following is the signature of .....

(Person registered.)

In testimony whereof I have hereunto signed my name and affixed the seal of this consulate.

[L. S.] .....

American Consul.

Immediately upon the registration of an American citizen the fact of such registration should be certified to the embassy or legation in the country in which the consulate is situated, and a duplicate of the registration should be forthwith sent to this Department, together with a statement whether a certificate of registration has been issued.

When a certificate of registration shall have expired and a new one has been issued notice of this fact should be sent immediately to the embassy or legation in the country in which the consulate is situated and to this Department.

American citizens resident abroad are required to register each year, and any additional facts concerning residence, marriage, and children should be noted in the register, but the full registration having been made once need not be repeated on each subsequent registration.

The Department expects consuls to observe this requirement with great care, and if they are uncertain concerning any of their duties in relation thereto they should ask for instructions from the Department.

I am, Gentlemen, your obedient servant,

ELIHU ROOT.

APPLICATIONS FOR REGISTRATION.

DEPARTMENT OF STATE,
Washington, March 2, 1908.

To the American Consular Officers.

GENTLEMEN: Referring to the Department's circular instruction of April, 19, 1907, regarding the registration of American citizens, I have to say that as applications for registration are nearly always made in person to a consul, it is not necessary in ordinary cases that they should be in the form of an affidavit. If the consul is convinced of the truth of the statements of an applicant who is entitled to registration, he may be registered without making a sworn statement; or, if the consul deems it desirable, he may be verbally sworn to the facts set forth in the certificate of registration; but whenever an applicant against whom the presumption of expatriation lies submits evidence to overcome the presumption, this evidence must be in the form of an affidavit or affidavits, made in duplicate. For the convenience of consuls a form of affidavit for this purpose has been prepared to be used in these cases, and I enclose herewith a copy. Whether or not the affidavit to overcome the presumption of expatriation shall be supported by corroborative evidence must depend upon the consul's judgment applied to each case. When the consul has reason to believe the truth of the applicant's affidavit setting forth specific facts and circumstances which are sufficient to overcome the presumption of expatriation, corroborative evidence need not be required, but the consul should state that the facts alleged in the affidavit are true according to his information and belief. When the consul can not make this statement he

should require evidence to corroborate the applicant's affidavit, and he should report whether the affidavit and the corroborative evidence are satisfactory proof to him that the applicant has overcome the presumption of expatriation.

I am, Gentlemen, your obedient servant,

(For the Secretary of State:)

W. J. CARR,
Chief Clerk.

[Form No. 213—Consular.]

(February, 1908.)

AFFIDAVIT TO OVERCOME PRESUMPTION OF EXPATRIATION.

(A naturalized citizen may overcome the presumption of expatriation by presenting satisfactory evidence establishing the following facts: (a) That his residence abroad is solely as a representative of American trade and commerce, and that he intends eventually to return to the United States permanently to reside; or, (b) that his residence abroad is in good faith for reasons of health or for education, and that he intends eventually to return to the United States to reside; or, (c) that some unforeseen and controlling exigency beyond his power to foresee has prevented his carrying out a bona fide intention to return to the United States within the time limited by law, and that it is his intention to return and reside in the United States immediately upon the removal of the preventing cause.)

I, ——— ———, a naturalized and loyal citizen of the United States, do solemnly swear that I last left my domicile in the United States at ——— on or about the —— day of ———, 1——; that I have since resided temporarily at ———; that I arrived

in ———, where I am now temporarily residing, on the —— day of ———, 1——, my reasons for such residence being as follows: ——— ——— and that I intend to return to the United States permanently to reside within ——$\begin{matrix}\text{months,}\\\text{years,}\end{matrix}$ or when ——— ———.

——— ———

Subscribed and sworn to before me at ——— this —— day of ———, 19——.

[SEAL.]

——— ———

American ———

The facts recited in the foregoing affidavit are true to the best if my information and belief, and are satisfactory evidence to overcome the presumption that the affiant has ceased to be an American citizen.

——— ———

American ———

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Supreme Court of the United States.

October Term 1923.

No. 205.

THE UNITED STATES, *Appellant*,
v.
ALPHONSE GAY.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

GEORGE A. KING,
WILLIAM B. KING,
GEORGE R. SHIELDS,
Attorneys for Appellee.

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Supreme Court of the United States.

October Term, 1923.

THE UNITED STATES, *Appellant*,
v.
ALPHONSE GAY. } No. 205.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

I. STATEMENT OF THE CASE.

Alphonse Gay filed a petition in the Court of Claims claiming pay as a warrant officer, a machinist, on the list of officers of the Navy retired from active service, from May 1, 1916, to June 12, 1922 (Second amended petition, rec. pp. 1, 2; supplemental petition, pp. 3, 4.)

The facts are set forth in the findings of the Court of Claims (rec. 5–7). The summary in brief for United States (pp. 1–4) should be ignored as inaccurate and argumentative. The court decided that the officer was entitled to his retired pay as a machinist and gave judgment accordingly. The opinion was delivered by Judge Hay, and is reported 57 C. Cls. 424. The United States appealed (foot p. 10).

II. BRIEF OF ARGUMENT.

The opinion of the Court of Claims so clearly states its conclusions that this brief will be arranged in the

order of the opinion, quoting each of its parts, followed by supporting authorities.

Never Dismissed from the Navy.

The opinion opens (Record, pp. 7, 8):

"This is a suit brought by the plaintiff to recover the retired pay of a machinist in the Navy, the plaintiff having been retired as a machinist on November 23, 1908. He was paid his retired pay from the date of his retirement up to May 1, 1916, but since that date his retired pay has been withheld, and he alleges that there is now due him the sum of $10,078.90 [amended to $10,302.52]. He was notified on June 19 and July 25, 1916, by the pay officer of the New York Navy Yard, that that officer had been directed by the Navy Department to make no further payments to him. On September 1, 1916, he wrote to the Chief of the Bureau of Navigation, Navy Department, Washington, D. C., requesting to be informed why his pay had been stopped. To this letter no response was made, and on May 24, 1917, he brought this suit in this court.

"The effect of this action of the Navy Department was to remove the plaintiff from his position as a retired officer of the Navy and to deprive him of his rights as such and of the emoluments guaranteed him as such retired officer without giving him an opportunity to be heard. The reasons given for this action by the Navy Department are that the plaintiff under the act of March 2, 1907, should be officially regarded as having expatriated himself; and that having so expatriated himself the plaintiff had abandoned his office as a machinist in the Navy in view of the requirement of the law and regulations that officers of the Navy must in all cases be citizens of the United States. It will be observed that these reasons and conclusions were never communicated to the plaintiff, and he was given no opportunity to make answer to them."

This summary is to be read in connection with the more detailed statement contained in the findings

(Finding III, pp. 5–7). These findings show that in fact the appellee was never dismissed from the Navy. On the contrary, he continued to be recognized by various officers of the Navy Department, as well as by the Naval Attaché at Paris, as an officer of the Navy down to about three months of the time that the pay officer of the New York Navy Yard notified him that the pay officer had been directed by the Navy Department to make no further payments to him (Finding III, near top p. 7). It does not even appear directly that such instructions were sent, but only that the pay officer alleged that they were. No actual removal was attempted. Such removal would not only have been unauthorized, but is directly prohibited by the following provisions:

Revised Statutes, Sec. 1229. * * * And no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of a sentence of a court-martial to that effect, or in commutation thereof.

Sec. 1624. The Navy of the United States shall be governed by the following articles:

Art. 36. No officer shall be dismissed from the naval service except by the order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof.

Art. 64. Within the meaning of the foregoing articles unless there is something in the context or subject matter repugnant to or inconsistent with such construction, officers shall mean commissioned and warrant officers, and paymasters' clerks; superior officers shall be held to include mates and petty officers of the Navy and noncommissioned officers of the Marine Corps, in addition to the officers enumerated. This article is not one of the "Articles for the Government of the Navy," as contained in the statutes, but is appended in explanation thereof.

The construction of the word "officers," in the above article as including a warrant officer is in accordance with the decision of this court in *Brown* v. *United States*, 113 U. S. 568, 570, in which it was held that when the term "officer" is used in a statute relating to the Navy it includes a warrant as well as a commissioned officer.

Warrant officers of the Navy are appointed by the President. Revised Statutes, Secs. 1405, 1406. Machinists are created as a class of warrant officers by the Navy Personnel Act of March 3, 1899 (Chap. 413, Secs. 14, 15, 30 Stat. 1004, 1007, 1008). Like other officers, they may be dismissed only by sentence of court martial. *Stokes' Case*, 28 Opns. 325.

In *United States* v. *Redgrave* and *Perkins*, 116 U. S. 474, 483, it was held that where under a mistake of law the Navy Department undertook to discharge a cadet engineer from the naval service at the end of his academic course at the Naval Academy, such action is invalid as against statutory provisions prohibiting the discharge of such cadet otherwise than for misconduct or upon sentence of a court-martial (116 U. S. 485).

In *Runkle* v. *United States*, 122 U. S. 543, a retired officer was sentenced by court-martial to dismissal from the Army. The proceedings were approved by the Secretary of War, but not by the President. A subsequent President disapproved them. It was held that the order of dismissal required by law the approval of the President to be effective, and that the officer had never been out of the Army.

In *United States* v. *Wickersham*, 201 U. S. 390, an officer in the civil service was dismissed by a local superior, but not by the appointing power, the head of the department. The court said (p. 399):

"We see no reason in such an attitude of the case,

where the wrongful suspension is clearly established, and the ability of the incumbent to discharge the duties of his office affirmatively found, for withholding from him the compensation given by law to an incumbent of the place. If this be not so, then a regular and duly qualified employeé in the public service protected by this statute and the orders of the President made in pursuance thereof, can be deprived of the benefitand emolument of his position by a wrongful and illegal suspension from his duties. We do not think that such a contention can be sustained either by reason or authority. Where an officer is wrongfully suspended by one having no authority to make such an order, he ought to be, and is, entitled to the compensation provided by law during such suspension."

Far from being removed, he was continuously recognized as an officer of the Navy down to the time of the stoppage of his pay, and even afterwards.

The jurisdiction of the Navy Department over this officer was asserted by the orders given him January 11, 1916, and again February 24, 1916, direct from the Navy Department requiring a report from him to the Naval Attaché at Paris by letter. With these orders he promptly complied. March 15, 1916, he expressed his readiness and willingness to leave Switzerland whenever recalled to the United States by the Navy Department (Rec. Finding III, first half p. 6). The control of the Navy Department over him as a part of the naval service of the United States was thus strongly asserted by the Navy Department and acknowledged by himself down to within two months of the time his pay was discontinued.

No notice was given him of any removal. An application to the Chief of the Bureau of Navigation asking why his pay had been stopped met with no response (p. 7, Par. 3).

November 12, 1917, he wrote the Bureau of Navigation offering his services on sea or on shore. It was stated at that time, "There is at present no duty in this office to which the above subject might be assigned" (middle p. 7).

The annual Navy Registers, made up as of the first of January of each year, showing the exact status of every officer, active and retired in the Navy, show him down to and including January 1, 1917, as a machinist on the retired list of the Navy, and under the column "Present residence or duty," he is listed "Abroad." This last date was eight months after that from which he had received no pay. (See "Register of the Commissioned and Warrant Officers of the United States Navy and Marine Corps," January 1, 1917, House Doc. 1758, 64th Cong. 2d Sess. pp. 218, 219.)

Status of Retired Officers.

A retired officer remains a part of the available military force of the country. By act of June 7, 1900 (Chap. 859, 31 Stat. 684, 703), "Any naval officer on the retired list may in the discretion of the Secretary of the Navy be ordered to such duty as he may be able to perform at sea or on shore." This statute was limited to twelve years, but was reenacted August 22, 1912 (Chap. 335, 37 Stat. 328, 329), without time limit and with the insertion of the words "with his consent."

It was decided in *United States* v. *Tyler*, 105 U. S. 244, 246, that retired officers of the Army still remain a part of the Army. The same point was stated in an amplified form in President Wilson's veto message of the Army appropriation bill of 1916 objecting to a provision of the revised Articles of War in that bill exempting from military jurisdiction retired officers not on

active duty. He said (House Doc. 1334, 64th Cong. 1st Sess. p. 2):

"Courts and Attorneys General have, in a long line of decisions, held that officers of the Army on the retired list hold public office. It thus appears that both the legislative and judicial branches have drawn a sharp distinction in status between retired officers, who are regarded and governed at all times as an effective reserve of skilled and experienced officers and a potential source of military strength, and mere pensioners, from whom no further military service is expected. Officers on the retired list of the Army are officers of the Army, members of the Military Establishment distinguished by their long service, and as such examples of discipline to the officers and men in the active Army. Moreover, they wear the uniform of the Army, their education and service hold them out as persons especially qualified in military matters to represent the spirit of the Military Establishment, and they are subject to active duty in time of national emergency by the mere order of the Commander in Chief. They are, therefore, members of the Army, officers of the United States, exemplars of discipline, and have in their keeping the good name and the good spirit of the entire Military Establishment before the world. Occupying such a relation, their subjection to the Rules and Articles of War and to trial by general court-martial have always been regarded as necessary in order that the retired list might not become a source of tendencies which would weaken the discipline of the active land forces and impair that control over those forces which the Constitution vests in the President."

Act of 1907, Sec. 2 (34 Stat. 1228) Construed.

The Court of Claims thus quoted and construed this act (pp. 8, 9):

"The provision of the statute under which the Navy Department held that the plaintiff had expatriated himself is as follows (34 Stat. 1228):

"'Sec. 2. That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign State in conformity with its laws, or when he had taken an oath of allegiance to any foreign State.

"'When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however*, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also*, That no American citizen shall be allowed to expatriate himself when this country is at war.'

"The act (Ch. 2534) is entitled 'An act in reference to the expatriation of citizens and their protection abroad.' The purpose of the act is to relieve the Government of the obligation to protect citizens residing abroad after the limit of two or five years, when their residence there is not shown to be of such a character as to warrant the presumption that they intend to return and reside in the United States. After the time limit has expired it is presumed that the citizen does not intend to return, and it is necessary, in order that he may have the protection of this Government, for him to show affirmatively that it is his bona fide intention to return to the United States to live. The essential thing under the act is the intention to return to and reside in the United States. Op. Atty. Gen. 28, 504, 508, 509. The provisions of the act are penal and are not to be extended to include any persons not within its purview."

The opinion thus referred to in *Gossin's* case, 28 Opns. 504, 508, 509, was to the following effect:

A native of Syria, naturalized in the United States, left this country for his native land, married a Syrian woman, and remained in that country for more than two years without making the required declaration of inten-

tion to return to the United States. After a lapse of two years, he returned to the United States accompanied by his wife. Their right to enter this country being questioned, the Attorney General held that both husband and wife were citizens of the United States, and as such were entitled to be admitted to the country. It was held that any presumption arising from foreign residence was rebuttable.

The history of the act is thus stated in that opinion (28 Opns. 508–510):

"As above stated, the act is entitled 'An Act in reference to the expatriation of citizens *and their protection abroad*,' and it appears that it was passed at the instance of the Department of State. In reporting the bill to the House, the Committee on Foreign Affairs said (House Report 6431, 59th Cong. 2d Sess.):

"'This bill follows in its general lines the recommendations of the Department of State. * * *

"'Perhaps the most important provision of the bill is desired by the State Department to guard against complications in which this country has often been involved. All desire that the flag of this country should protect an American citizen to the fullest extent. But none of us desire that some foreigner who does not intend to cast his lot permanently with us should endeavor to avail himself of the flag as a fraudulent protection. Many foreigners come here, become naturalized, and then return to their own countries or migrate to other parts of the world without any intention of returning to this country. They have not become citizens in good faith, but they seek to avail themselves of the protection of our citizenship in avoiding responsibility to which they may be subjected in other parts of the world.

"'This is not right. The citizenship of the United States should not be sought or possessed for commercial or dishonest ends. To guard against this evil, this bill provides that a naturalized citizen who leaves this country and dwells elsewhere continuously for five

years shall be presumed to have abandoned his citizenship. This presumption can be overcome, but such a provision as this would be a great assistance to the Department of State, would avoid possibilities of international complications, and will prevent those who are not entitled to its protection from dishonestly hiding under the American flag.'

"As further showing the purpose of the act, the remarks of Mr. Perkins, who reported the bill from the committee and had charge of it in the House, are pertinent. In the course of debate it was said (Cong. Rec. Vol. 41, pt. 2, p. 1466):

"'Mr. Bennet of New York. Mr. Speaker, I entirely agree with the gentleman from Colorado (Mr. Bonynge) as to section 3. I think it is too broad. In addition to the consideration that he urged upon the House, there is also the consideration of property rights and of property rights inhering in American-born citizens who might take through these foreign-born naturalized citizens. This bill will apply to a man who has now been abroad four years and eleven months, and if he remains abroad the other month he would be forced, under this statute, to become no longer a citizen of the United States, but a citizen of the country where he was.

"'Mr. Perkins. Allow me to correct the gentleman. That certainly is not the result of the statute at all.'

"'Mr. Bennet of New York. Why not?'

"'Mr. Perkins. The statute provides that, having remained there five years continuously, there shall be a presumption which, unless he satisfies the officers of the State Department, their consuls, or ministers to the contrary, would authorize the State Department to refuse to extend him protection. It can not affect any other rights, which, of course, he can present in court. No presumption is conclusive on a court. It is a mere presumption, but the presumption would protect the State Department. That is the object of the bill and the result of the bill and the only result of it.'"

Requirements of Act of March 2, 1907.

The act of 1907 (Chap. 2534, 34 Stat. 1228, 1229),

is entitled "An Act in reference to the expatriation of citizens and their protection abroad." Its provisions thus have reference to those two distinct objects. The first sentence of Section 2 provides two conditions and two only in which an American citizen shall be deemed to have expatriated himself:

1. "When he has been naturalized in any foreign state in conformity with its laws";
2. "When he has taken an oath of allegiance to any foreign state."

Neither of these acts took place in the present case. The provision immediately following as to residence for two years in a foreign state from which he came merely creates a presumption which may be overcome. No mention of expatriation or of cancellation of citizenship is contained in this second clause of Section 2. Congress is not to be deemed to have intended to prescribe a forfeiture of citizenship to residents abroad in the absence of explicit language to that effect.

Construction of State Department.

The construction placed upon the provision by the State Department is shown by a statement of Hon. Fred K. Nielsen, solicitor of that department, June 8, 1922, in the hearings before the House Committee on Immigration and Naturalization, 67th Congress, 2d Sess. Serial 5–B, 'Naturalization and Citizenship of Women," pp. 576, 577, 578:

"Now, let me pass to the act of March 2, 1907, in regard to expatriation, as we call it, by continued residence abroad. I do not see why you inject that feature into any pending legislation. The law says that persons who live abroad for a certain period shall be under the presumption that they have ceased to be American citizens.

"The court of last resort has never construed that very disagreeable provision. The Federal courts have differed on it; attorneys general have differed on it. Mr. Wickersham once said that it simply meant that a person living abroad for a stated period should not be regarded as entitled to the protection of his Government while so resident. That is the rule that the Department of State is proceeding on. And for many reasons which I would not bother you with I think that is the only sound rule.

* * * * * * * * *

"Mr. Kleczka. If I understood you correctly, you said that the Department of State followed some court ruling holding that an American citizen living abroad more than two years has not lost his American citizenship—that is, during the first two years he does not lose his right of protection?

"Mr. Nielsen. No; not until after the two years.

"Mr. Kleczka. After the two years he loses it?

"Mr. Nielsen. Nothing happens to him until he has been absent two years in the country of his origin, or five years in any other country. But unless he follows a certain procedure prescribed by statute, after those periods he is regarded as losing the right to protection.

"Mr. Kleczka. But not his citizenship?

"Mr. Nielsen. But not his citizenship.

"Mr. Kleczka. Notwithstanding that the law says he shall be deemed to have lost his citizenship?

"Mr. Nielsen. Yes; but that is very different from saying that his citizenship is cancelled. You create citizenship by judicial action, and you cancel it by judicial action; and I hope nobody will ever take the view that Congress has enacted a statute whereby you can cancel citizenship by a mere administrative procedure not specifically described."

In American Journal of International Law, Vol. 8, 1914, in "Observations on the New German Law of Nationality," by Mr. Richard W. Flournoy, Jr., assistant solicitor of the State Department, it was said of the clause in question (p. 483):

"The precise meaning and effect of the statutory provision last quoted was for some time in doubt, but it seems to be pretty generally agreed now that its object is to furnish a definite rule for determining when protection should be withdrawn from naturalized citizens residing abroad, and that the presumption which it raises never becomes conclusive and is cancelled in case the person concerned returns to this country to reside permanently."

Other Authorities.

In *re Wildberger*, 214 Fed. 508, the court said of the act under consideration:

"The provisions of the act of March 2, 1907, are highly penal, and therefore by every accepted canon of construction are not to be extended to include any persons not within its purview."

In *Sinjen* v. *Miller*, 281 Fed. 889, the court said in regard to alleged expatriation of an American citizen of German birth (p. 891):

"I am convinced that the plaintiff is telling the exact truth when he swears that he at all times considered himself an American citizen, that he never intended to or did renounce his allegiance to this government, and that his intention to return hither for permanent domicile was fixed and abiding in his mind at all times."

This decree was affirmed by the Circuit Court of Appeals, *Miller* v. *Sinjen*, 289 Fed. 388. The case was one of a native of Germany, and reference was there made to the act of March 4, 1923, to amend the Trading with the Enemy Act (42 Stat. 1511, 1516, Chap. 285):

"Sec. 21. That the claim of any naturalized American citizen under the provisions of this Act shall not be denied on the ground of any presumption of expatria-

tion which has arisen against him, under the second sentence of section 2 of the Act entitled 'An Act in reference to the expatriation of citizens and their protection abroad,' approved March 2, 1907, if he shall give satisfactory evidence to the President, or the court, as the case may be, of his uninterrupted loyalty to the United States during his absence, and that he has returned to the United States, or that he, although desiring to return, has been prevented from so returning by circumstances beyond his control."

While this provision has no direct bearing on the present case, it does show the legislative construction of Sec. 2 of the act of March 2, 1907, just as the cases we are citing show the judicial construction. It will not be supposed that Congress was here extending a special privilege to German born citizens claiming the return of their property from the Alien Property Custodian, while withhholding the same right from a naturalized American citizen born in a friendly country and who had worn with honor and was still entitled to wear the uniform of the United States Navy.

The court (289 Fed. 392) thus specifically approved the above quoted opinion of Attorney General Wickersham:

"We are strongly impressed with the reasoning and with the conclusion of the Attorney General in 28 Op. Atty. Gen. 504, to the effect that the Act of March 2, 1907, has no application to the case of a naturalized citizen, who, having returned to his native country and resided there more than two years, has thereafter returned to the United States, but that the act is limited to naturalized citizens while residing in foreign countries beyond the period stated in the act."

In *United States* v. *Knight*, 291 Fed. 129, the court said on direct application of the government to cancel a certificate of naturalization (p. 134):

"It must be borne in mind these proceedings are to annul a solemn judicial grant of and by the United States to defendant, and 'nothing will warrant cancellation of his grant of citizenship but clear, unequivocal, and convincing evidence, that in quantity and quality inspires confidence and produces conviction of the truth of the charge virtually beyond reasonable doubt.' *U. S.* v. *Sharrock*, (D. C.) 276 Fed. 32."

In *Banning* v. *Penrose*, 255 Fed. 159, 161, the court said:

"The United States attorney also insists that, even if Banning was properly naturalized, he afterwards expatriated himself by his conduct in going to Germany and residing there some time, in Berlin. The authorities all are (and it would be useless to refer specifically to them) that a man who has become a naturalized citizen of one country, and goes back to the country of his origin, may stay there indefinitely, if his purpose is, all the time, in his mind, to retain his citizenship in the country of his adoption and to return there some time in the future. It is a question more of intention than anything else. That is the law as contained in all the decisions and the state papers read by counsel in this argument. Of course, various questions arise as to how his intention can be shown and in what way it can be shown.

"I do not think that there is anything in this case to show clearly that Mr. Banning ever intended not returning to the United States. On the contrary, every part of the evidence, which I will not undertake to go into in detail, and some of it very strongly, indicates that his intention was to retain his home in the country of his adoption. The evidence very clearly shows that Banning had an old father in Germany to whom he was devoted and whom he desired frequently to visit, and this seems to have been very largely the motive which actuated him in going over there, while from his own evidence it is clear that he enjoyed the life of Berlin and had rooms, as if expecting to remain there a while.

"Believing that he was regularly naturalized, the evidence that he intended to take up a permanent residence in Germany should be reasonably clear. It is not so here."

Of course all this applies with greatly added force to an officer of the Navy having express permission from the Department to reside abroad indefinitely.

The presumption arising under Sec. 2 of the act of 1907, is no stronger than that established by Sec. 15 of the act of June 29, 1906 (34 Stat. 596, 601, Chap. 3592), that a naturalized citizen taking up permanent residence in a foreign country within five years of his naturalization shall be presumed to have become naturalized without intention to become a permanent citizen of the United States.

This court has said in regard to that section, *Luria* v. *United States*, 231 U. S. 9, 25:

"It will be observed that this provision prescribes a rule of evidence, not of substantive right. It goes no farther than to establish a rebuttable presumption which the possessor of the certificate is free to overcome."

Status of Naturalized Citizens.

The act of July 27, 1868 (Chap. 249, 15 Stat. 223), embodied in Revised Statutes, Secs. 1999, 2000, 2001, states a fundamental principle as to the equality of right of a naturalized with a natural born citizen of the United States. Under it every United States citizen of foreign birth has precisely the same rights and is entitled to the same protection as one born in the United States.

In *United States* v. *Wong Kim Ark*, 169 U. S. 649, this court decided that a person of pure Chinese blood born within the United States is a native born citizen.

The rule contended for by the United States would extend to such persons the protection of our laws to an extent beyond that accorded to Americans of the type of Carl Schurz, Franklin K. Lane, or Knute Nelson, just because each of these splendid exemplifications of Americanism happened to be born under a foreign flag. A view so contrary to the first principles of American citizenship should be repudiated.

The Officer not Within the Act of 1907.

The Court of Claims on this point says (pp. 9, 10):

"From the facts proved it appears that the plaintiff does not come within the provisions of the act. He was an officer of the United States Navy who went abroad with the permission of the Navy Department; that permission was repeatedly renewed, and while living in Switzerland under this permission of the department his pay as such officer is taken from him without any reason therefor being given to him. It is true that, acting upon the opinion of a subordinate officer of the department that he had expatriated himself, his pay was stopped. But all the facts in the case were apparently not submitted to the department, and even if they had been we are of opinion that it was not in the province of the Navy Department, or of any of its officers, to pass upon the rights of the plaintiff and to declare that he had expatriated himself, and thereby to dismiss him from the Navy, and take from him his retired pay to which he was entitled under the law, and which he had earned by long active service in the Navy. The act of March 2, 1907, was only intended to authorize the State Department to refuse to extend its protection to citizens who, having remained in a foreign country two or five years continuously, failed to satisfy the officers of the State Department that they intended to return to and reside in the United States. The act does not affect any other rights.

"In the case at bar the plaintiff, when his attention was called to the fact that he had resided in Switzer-

land, the country of his birth, for more than two years continuously, promptly made the affidavit required of him by the consular officer. He complied with the law, although he might well have insisted that he did not come under its provisions, and having complied with it, and rebutted the presumption raised by the statute, he can not now be held to have expatriated himself. He presented satisfactory evidence to a consular officer of the United States of his intention to return to and live in the United States.

"The fact that the affidavit was not sent to the Department of State has nothing to do with its force and effect, for, as far as this record shows, it was not necessary to its validity that it should be forwarded to the department. Having once made the affidavit it was not necessary under the provisions of the act to make one every two years.

"The facts show that the plaintiff intended to return to the United States to live; and moreover, it is shown that the plaintiff when war was declared promptly tendered his services to his Government.

"The court is of opinion that the plaintiff has not expatriated himself, and is still a citizen of the United States. He is therefore entitled to all his rights as such, and is entitled to his pay as a retired officer of the Navy from May 1, 1916, up to the present time."

No presumption of expatriation of a naturalized American citizen who is also an officer of the Navy can be indulged where his residence abroad is by permission of the Navy Department to which he is responsible.

Shortly after his retirement from active service, he was in 1909, granted permission to leave the limits of the United States for a period of one year from September 16, 1909. August 17, 1910, he was authorized to remain abroad for one year from September 16, 1910. September 12, 1911, he was authorized to remain abroad for a period of one year. August 30, 1912, he was authorized to remain abroad beyond the limits of the United States indefinitely (Finding III, foot p. 5).

The Bureau of Navigation was kept informed of his address by letters written annually or oftener (top p. 6). The Navy Registers as we have seen (end of Finding III, rec. middle p. 7, *ante*, *p.* 6), show him during all this period down to and including January 1, 1917, as residing abroad, so that his residence in his native country was not only with full knowledge of the Navy Department but by its express authority. Under these circumstances no possible presumption of abandonment of citizenship could arise. The mere fact that he was residing abroad by departmental permission, coupled with the fact that the Navy Department at any time had power to revoke his permission to go beyond the limits of the United States is sufficient to rebut any presumption of abandonment of American citizenship.

The Navy Regulations of 1909, which were in force when this officer first went abroad provide (Art. 234):

"(1) Every officer of the Navy or the Marine Corps shall keep the Bureau of Navigation or the commandant of the Marine Corps, respectively, informed of his usual residence and of the address of his wife or next of kin. When ordered to his home he shall, upon the receipt of the order, certify upon it his place of residence, which must in all cases correspond to that which he has previously reported to the Bureau of Navigation or Headquarters of the Marine Corps.

"(2) No officer, active or retired, shall change his usual residence without permission of the Bureau of Navigation."

Also from same Regulations, Art. 1526:

"Permission to leave the United States will be granted only by the Secretary of the Navy."

Similar provisions are in the later Naval Instructions of 1913, Arts. 704, 705, 706, referred to in the findings top p. 6.

Notwithstanding that the officer was not within the terms of Sec. 2 of the act of 1907, he complied with it.

Nothing in either the law or regulations prescribe how often the affidavit to overcome the presumption of expatriation should be repeated. He made one or more such affidavits (rec. p. 6, end of 1st par.), one being in 1912 (p. 6, end of 2d par.). A failure, if any occurred, to register annually at the American Consulate affected no right of citizenship.

The following finding of the Court of Claims absolutely rebuts any presumption of any intent to abandon his American citizenship:

"He has always borne true faith and allegiance to the United States and has done no act inconsistent with his allegiance nor with his status as an officer of the United States Navy." (Finding II, middle p. 5.)

Evidence and Findings.

The opinion of the Court of Claims concludes as follows (top p. 10):

"The defendant's attorney has asked us to make certain findings based upon affidavits made by certain officers of the Government. These affidavits are merely ex parte statements and are not competent evidence. The persons who made the affidavits could have been examined by the defendant. The fact that they were not leaves the court to infer that the evidence which they might have given would not have stood the test of scrutiny. At all events there is no reason to depart from a long and well established rule.

"For the reasons above given the court is of opinion that the plaintiff is entitled to recover. It is so ordered."

The rules excluding affidavits as evidence of facts are in full force in the Court of Claims.

In *Moore* v. *United States*, 91 U. S. 270, this court said (p. 274):

"We think that where Congress has not provided, and no special reason demands, a different rule, the rules of evidence as found in the common law ought to govern the action of the Court of Claims."

The statute requires that each party have an opportunity to examine the witnesses of the other. (Judicial Code, Sec. 169, March 3, 1911, Chap. 231, 36 Stat. 1140.)

The rules of this court with reference to appeals from the Court of Claims exclude the sending up of any evidence and make the findings of fact conclusive.

This court has said in *Desmare* v. *United States* (93 U. S. 605, 610):

"The findings of the Court of Claims furnish the facts we are to consider, and we can not look beyond them. For the purposes of this case they import absolute verity and conclude both parties."

In *United States* v. *Anciens Etablissements* (224 U. S. 309, 330) the court said:

"The finding determines the matter, being in the nature of a special verdict of a jury."

Thus the findings are conclusive in this court on appeal. No different case can be presented here from that shown in the findings of the Court of Claims.

Robinson v. *Baltimore & Ohio R. R. Co.* 222 U. S. 506, 512;
Givens v. *Zerbst*, 255 U. S. 11, 22;
Nagle v. *United States*, 145 Fed. 302, 306;
Sturla v. *Freccia*, L. R. 5 Appeal Cases, 623, 643.

CONCLUSION.

This officer served faithfully on the active list of the Navy as an enlisted man and warrant officer for over twenty years. He became a naturalized citizen of the United States after the performance of enlisted service but before being appointed to office in the Navy. He was retired in 1908 for disability incurred in the course of his long and faithful service. After his retirement, he each year requested and obtained permission to be allowed to remain abroad, until in 1912 the permission was made indefinite as to time. Unless such permission can be used as a trap for the unwary, he can not be held to have abandoned his American citizenship so long as he was availing himself thereof. On January 11, 1916, he was officially notified by the Director of Naval Intelligence of the Navy Department that he had been slated for duty in time of war (Finding III, middle p. 6). This shows that the permission to remain abroad was regarded as still continuing in force. His permission to remain abroad was expressly recognized by the statement made in that letter, "should you remain abroad indefinitely, and opportunity offer, it is requested that you confer with the naval attaché at Paris." (Finding III, middle p. 6.) With this last direction he fully and strictly complied (last half p. 6, top p. 7). Only shortly afterwards he was notified that his pay was stopped. His name continued to appear on the Navy Register after as well as before the stoppage of his pay. Inquiry as to the reason for the stoppage and a statement of his readiness to answer for his actions met with no response. After the outbreak of the war, he still received a circular letter addressed to all retired officers and November 12, 1917, he wrote the Bureau of Navigation "stating that he was able to perform sea or

shore duty; that his health was in very good condition, and that the deafness for which he was retired was improving; that he could speak French fluently; and that a call to any duty to which the department would see fit to assign him would be gladly received." (Finding III, one-third down p. 7.)

His declarations and conduct at all times have been those of a loyal citizen of the United States and a faithful officer of its Navy. He has never been removed from office. He therefore still holds office and is entitled to its emoluments. His treatment by executive officers of the Government has been singularly undeserved by one who served his country faithfully for twenty years, received a medal of honor, and incurred physical disability in her service.

We can not more appropriately conclude this brief than with the eloquent words of Attorney General Jeremiah S. Black in his report on Navy cases, 9 Opns. 212, 216:

"To strike a lawyer or a seaman in the middle or in the decline of life ignominiously from the rolls of his profession, is an injury far more severe than to confiscate the lands of the farmer or the goods of a merchant. It may be that some of our naval officers have committed crimes atrocious enough to deserve this extreme and frightful penalty, but God in his mercy forbid that the people of this nation shall ever become tame enough patiently to see it inflicted even on the guilty, without the full sanction of their ordained and established law."

GEORGE A. KING,
WILLIAM B. KING,
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Attorneys for Appellee.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

This appeal is for the review of a judgment of the Court of Claims for the sum of $10,302.52 in favor of the appellee for pay as a machinist on the retired list of the Navy from May 1, 1916, to June 13, 1922, at the rate of $1,687.50 per year.

It is contested by the United States on the ground that Gay had ceased to be an American citizen. For this the Act of March 2, 1907, c. 2534, 34 Stat. 1228, is adduced, and that he, having expatriated himself, abandoned his office as machinist in the Navy, the law and regulations requiring that officers of the Navy must in all cases be American citizens. The further contention is that from the date of abandonment he was not entitled to pay.

The facts are not in dispute. Gay, after serving as an enlisted man in the Navy, was appointed, by warrant of the President, a warrant machinist, the title of which office was changed by subsequent legislation to machinist. He remained on the active list until November 23, 1908, when he was retired from active service on account of deafness.

He was born in Switzerland, May 19, 1856, and was admitted to citizenship August 4, 1897, and has done no act inconsistent with his allegiance nor with his status as an officer of the Navy.

On retirement he was given permission to leave the United States for three successive years, and on August 30, 1912, he was authorized to remain abroad indefinitely. In accordance with the permission, he has been residing in Switzerland, but has kept the Bureau of Navigation informed as to his address as required by the Naval Instructions. He made one or more affidavits of continued American citizenship before the American Consul at Geneva.

He was registered as an American citizen at that consulate and received a registration certificate. On November 25, 1912, he requested a renewal of his certificate but was informed by the Consul that since he had lived over two years in Switzerland, the country of his birth, he would have to sign an affidavit to overcome the presumption of expatriation. He signed such affidavit, and on November 26, 1912, he called at the consulate and asked that the affidavit not be sent to the Department of State.

On January 11, 1916, he was notified by letter from the Navy Department that he had been selected for duty in connection with the Naval Intelligence Office in time of war and requested, in case of return to the United States and to Washington, to call at that office, but "should you remain abroad indefinitely, and opportunity offer, it is requested that you confer with the naval attaché at Paris." The letter was transmitted to him through the naval attaché at Paris with request to acknowledge receipt, which he did on January 28, 1916.

On February 24, 1916, the Chief of the Bureau of Navigation of the Navy Department addressed him a copy of General Instructions issued to naval officers abroad directing them to notify the accredited naval attaché of their presence, address and probable length of stay, etc., or if in countries or colonies to which no naval attaché is accredited, to make similar report to the nearest United States naval attaché practicable.

On March 15, 1916, in accordance with this order, he notified the attaché at Paris, giving particulars in regard to his residence, and expressing himself as ready and willing to leave Switzerland whenever recalled to the United States by the Navy Department.

On March 17, 1916, the receipt of the letter was acknowledged, stating, "2. In case you are in the vicinity of Paris, I would be greatly obliged if you would call at the embassy in order to receive certain confidential informa-

tion which I have been directed by the Navy Department to furnish you. 3. There is no immediate necessity of your coming to Paris at present."

On June 19, 1916, and again on July 25, 1916, he was notified by the pay officer of the New York Navy Yard, who had been carrying his accounts and paying his monthly retired pay, that he, the officer, had been directed by the Navy Department to make no further payments to him, Gay.

On September 1, 1916, he wrote to the Chief of the Bureau of Navigation of the Navy Department, Washington, requesting to be informed of the reason for that action, stating that he was ready to answer at any time for his action. No response seems to have been made to his letter. On November 12, 1917, he informed the Bureau of Navigation that he was able to perform sea or shore duty, but in the following month it was officially stated that there was no duty to which he " might be assigned." His name appeared continuously on the official published annual " Register of the Commissioned and Warrant Officers of the Navy and Marine Corps," down to and including that of January 1, 1917. He is carried on it as a machinist on the retired list of the Navy and, under the column " Present Residence or Duty," he is listed "Abroad." It does not appear by what authority his name was omitted from the register.

The contention of the United States is that Gay having resided for over two years in Switzerland, the place of his birth, the presumption occurred that he had ceased to be an American citizen. And this presumption, it is further contended, was not overcome by " the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe." Section 2 of the Act of March 2, 1907, is cited for the contention. The section provides as follows: " When any naturalized citi-

zen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war."

The contention puts out of view all of the other facts of the case—puts out of view the rights of Gay as an officer of the Navy. To be such officer he had to be a citizen, but, being such officer, he had relations and rights besides those of citizenship. And this was recognized—recognized by him, and recognized by the Navy Department. His going and staying abroad was submitted to the judgment and permission of the Department, first in yearly applications for three successive years and then by permission "to remain abroad indefinitely." He reported to the Bureau of Navigation his address each year as required by its regulations. The Department was, therefore, enabled to and did inform him that he had been selected for duty, and directed him to confer with the naval attaché at Paris, which he did, giving particulars in regard to his residence and willingness to respond to a call to duty. To this the attaché responded as follows: "2. In case you are in the vicinity of Paris, I would be greatly obliged if you would call at the embassy in order to receive certain confidential information which I have been directed by the Navy Department to furnish you. 3. There is no immediate necessity of your coming to Paris at present."

Up to this moment of time, he was an officer in the Navy, one worthy of "confidential information"; and it

is to be remembered that a war was in progress—a war in which at any time this country might become engaged, and subsequently did become engaged. A discontinuance of his pay came soon after; it was as abrupt as it is unexplained, and we are induced to say, inexplicable. Gay, we repeat, was an officer of the Navy, and as such he was subject to duties and as such he was entitled to rights; for neglect or violation of duty he was subject to reprimand and, it might be, punishment, but punishment only after charge and conviction. §§ 1229 and 1624 Rev. Stats.[1] This was his right even if there had been culpability in his actions. There was none. We find no act of dereliction in his retirement nor afterwards. All was done in submission to, and under permission granted by, the Navy Department, in exercise of law. By that law his case must be judged. The Act of March 2, 1907, has other purpose. That act has only to do with the action of a citizen as such, having no other relations. His place of residence was an element in making him a citizen, it might be regarded as an element in continuing him a citizen; and presumptions could be erected upon it and we are prompted to say it is a presumption easy to preclude, and easy to overcome. It is a matter of option and intention.

The relation of an officer of the Navy to his place of residence is entirely different. It is selected in submission to Navy Regulations, subordinate to his duty, subject to change; and, that it may be so, he must keep the Bureau

[1] Revised Statutes, § 1624, being the Articles for the Government of the Navy, Article 36 of which provides: "No officer shall be dismissed from the naval service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof."

Article 64 of said Articles for the Government of the Navy provides that "officers shall mean commissioned and warrant officers, . . ."

of Navigation informed of it. To these conditions Gay was at all times in conformity.

The finding of the Court of Claims is that: "He has always borne true faith and allegiance to the United States and has done no act inconsistent with his allegiance nor with his status as an officer of the United States Navy."

Judgment affirmed.

UNITED STATES *v.* GAY.

APPEAL FROM THE COURT OF CLAIMS.

No. 205. Argued March 11, 1924.—Decided April 7, 1924.

Section 3 of the Act of March 2, 1907, 34 Stat. 1228, in providing that when any naturalized citizen shall have resided for two years in the foreign state from which he came it shall be presumed that he has ceased to be an American citizen, does not apply to a retired officer of the Navy who resided abroad with the permission of the Navy Department, reported to it each year as required by the regulations, evidenced his willingness to respond to the call of duty and performed no act inconsistent with his allegiance or his official status. P. 356.

57 Ct. Clms. 424, affirmed.

APPEAL from a judgment of the Court of Claims sustaining the claim of a retired warrant machinist in the Navy for pay unlawfully withheld.

Mr. Assistant Attorney General Lovett, with whom *Mr. Solicitor General Beck* and *Mr. John G. Ewing* were on the brief, for the United States.

Mr. George A. King, with whom *Mr. William B. King* and *Mr. George R. Shields* were on the brief, for appellee.

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